89-1966

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICHARD A. BANKS,
Petitioner, Plaintiff
vs.
H. LAWRENCE GARRETT, III,
Secretary of the Navy,
Respondent, Defendant.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment and 10 U.S.C. §1034 bar the Navy from punishing Petitioner, a military reservist, for corresponding with members of Congress, while not on active duty, and about a matter of national interest involving government waste, fraud or abuse of authority?

2. Does the United States Court of Appeals for the Federal Circuit treatment of Petitioner as a public employee conflict with 5 U.S.C. §2105(d) which explicitly states a reservist not on active duty is not a public employee?

3. Is U.S. Navy Regulation Article 1149 on its face unconstitutionally vague and overbroad and inconsistent with 10 U.S.C. §1034 because of its prior restraint of any person in the Navy from communicating with Congress without first obtaining Navy permission?

4. Is the Navy's maintaining of a secret file on the Petitioner's writing of a letter to members of Congress a violation of the Privacy Act which prohibits any government agency from maintaining any record describing how a person exercises rights guaranteed by the First Amendment unless certain circumstances exist?

5. Does the Navy's ad hoc removal of Petitioner from his paid reservist job without due process as required by Navy Regulations, and solely because he exercised his rights under the First Amendment and 10 U.S.C. §1034, constitute a substantive right entitling him to recover back pay pursuant to which the U.S. District Court has jurisdiction under the Little Tucker Act?

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STATEMENT OF GROUNDS FOR JURISDICTION

The original opinion and judgment of the Court of Appeals were dated and entered February 9, 1990. A timely Petition for Rehearing was denied March 12, 1990. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The United States statutes and regulations involved are United States Constitution, First Amendment; 5 U.S.C. §552; 5 U.S.C. §2105; 10 U.S.C. §1034; 28 U.S.C. §1346; 42 U.S.C. §1983; 45 Comp. Gen. 405; CNAVRES INST 1001.1c; Navy Military Personnel Manual §3410100; Navy Regulation Article 1148; and Navy Regulation Article 1149, the most significant of which are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner, Richard A. Banks (hereinafter "Banks"), is a Navy aviator in the United States Naval Reserve. From December 1966 and continuing until December 1971, Banks served as a Naval aviator flying attack bombers and his Navy active duty record includes 126 missions of combat flying during the Vietnam War.

Prior to July 1983, at the behest of Congress, the United States Navy proposed for the first time to deliver new FA/18 Hornet attack aircraft to a Navy Reserve squadron. On July 25, 1983, Banks assumed command of VFA-303 which was to be the first squadron to receive the newly constructed aircraft. Many enlisted personnel were selected from all over the country. The move to Lemoore moved 45 active duty enlisted personnel and 4 active duty officers and their families to Lemoore. The new aircraft were scheduled for delivery starting April, 1984.

The decision to provide new aircraft to the Naval Reserve was not without controversy. Indeed, once the Congressional authorization had been made to transfer the aircraft to the reserve squadron, members of the active duty Regular Navy officers lobbied Congressional staff members to rescind the authorization. Most of this lobbying effort apparently took place by the active duty regular Navy officers lobbying Carl Smith, who was then a staff member with the Senate Armed Services Committee. Their position was that reservists who drove Mercedes Benzes during the week should not be getting new aircraft while regular Navy pilots were still flying older aircraft. The intensive lobbying effort by the regular Navy establishment officers in violation of Navy Regulations and Congressional Statutes was not subject to criticism by the regular Navy, nor did the Navy seek to punish these regular Navy officers in the same way it sought to punish Banks when he sought to express his

First Amendment rights concerning what he perceived as a serious problem of waste and threat to military readiness and reserve mobilization.

In December of 1983, Banks heard that the delivery of the FA/18 aircraft to the reserve units would be canceled.

Banks called Admiral Fred Palmer, former chief of Naval Reserve, to seek his advice on what to do to express his concerns regarding the possible reversal. He asked Palmer what could be done. Palmer suggested a letter writing campaign to Congress. In late December, 1983, Banks discussed two ways of addressing the matter with his immediate superior, Captain Thomas B. Latendresse. These two methods were a letter to individual members of Congress expressing his concern, and an official letter to the Secretary of the Navy via the chain of command, expressing his concern. In December, 1983, Banks forwarded an official letter to the Secretary of the Navy via his chain of command, expressing his concerns. The letter was subsequently returned to him to require the inclusion of additional addressees. The letter was corrected and sent out again with a later date. Banks never received a reply to the letter from the Secretary of the Navy to whom the letter was addressed or from anyone else to whom the letter was sent.

After January 1, 1984, events occurred which indicated that a clear change in direction for Banks' squadron, VFA-303, was occurring. The squadron lost its assigned parking places at Naval Air Station Lemoore, where it had only recently moved, and a planned FA/18 maintenance conference for Banks squadron in St. Louis when the aircraft were built was canceled.

Banks needed information to quell rumors and discontent. He called Rear Admiral T.F. Rinard (hereinafter "Rinard") and others on January 6, 1984. Rinard was not forthright and did

not tell Banks what was then known. The Navy's position later became there was no obligation "on the part of anyone to tell Commander Banks" what was happening, even though Banks had the ongoing obligation in transitioning his squadron.

Banks also discussed writing the letter to Congress with Rinard who was the Commander, Naval Air Reserve Forces. Neither Latendresse nor Rinard discouraged Banks from writing the Congressional letter, nor did they advise him of the limits of what he could say in such a letter. Admiral Palmer had similarly not given any advice on how to write Congress. Banks then sought the advice of Captain John Bell at the Naval Reserve Association. He was advised he could write members of Congress using his rank and position as a Naval Reservist not on active duty.

He also obtained a copy and read 10 U.S.C. §1034. In determining to write the letter he followed the advice he received and what to him was the plain language of the statute.

Banks with the assistance of the wife of another reservist, drafted a letter to members of Congress dated January 6, 1984. At the time Banks drafted the letter, Banks was not on any duty status. That is to say, he was not on active duty, he was not on active duty for training, he was not in an inactive duty drill status, either for pay or non-pay. He was in fact in every respect, a civilian. He had completed his duty and was on his way home. He would not have been subject to jurisdiction under Uniform Code of Military Justice, the Hatch Act, or any similar act which controlled the activities of active duty personnel or reserve personnel in an active duty status.

The letter stated that Banks was concerned about the possibility that "the current planned transition of this command to FA/18 aircraft is in jeopardy." Banks saw the cancellation of

the delivery of FA/18 aircraft to his reserve squadron as having a serious impact on Naval Reserve mobilization and the readiness of the Naval Reserve to respond in times of need in a less costly manner than if regular Navy were exclusively used. Banks, through his letters, attempted to point out the problem, and to generate Congressional interest in following through on a decision previously made by the Navy at Congressional insistence and subsequent Congressional appropriations approval.

Within days after he sent the letters to the individual members of Congress, Banks learned from an anti-reserve Navy Captain that, indeed, the Navy had changed its plans. Carl Smith, having been successfully lobbied by the Regular Navy, had put political pressure on the Secretary of the Navy and caused the change.

When the active duty Navy received information about the letter to individual members of Congress there was immediate outcry. Captain Jerry Palmer contacted Banks and informed him that his letter had "created a hornet's nest and the Secretary of the Navy was pissed."

Copies of the letter were received by Rinard and Vice Admiral Kempt, the Chief of Naval Reserve. In late January of 1984 Rinard conferred with Vice Admiral Kempt and Vice Admiral Kempt conferred with the Secretary of the Navy, John F. Lehman, Jr., about what to do to Banks.

Lehman already knew about the problem and continued to discuss it. Banks' letter had also aggravated the Chief of Naval Operations. Admiral Watkins "was more animated and was angry about it." Kempt considered the problem a "hot potato" because of the conflicting interests of junior Regular Navy personnel and the Reserves.

It was decided to relieve Banks from his command of VFA-303, which was a pay billet with substantial pay and significant responsibility, and to transfer him to a voluntary training unit which was a non-pay unit and which contained members who did not have mobilization assignments and were not within the mobilization plans of the Navy Reserve. Neither Rinard nor Kempt made any full research into applicable law or regulations before firing Banks. Rinard told Banks by telephone he was immediately transferred to a non-pay VTU.

In March, 1984, Rinard initiated and executed an adverse fitness report on Banks. For the first time, Rinard in writing stated that he had transferred Banks "solely" due to his alleged violation of Article 1149 of Navy Regulations. Rinard arbitrarily assigned Banks low grades across the face of the fitness report and placed negative comments on the back of the fitness report. The report would have prevented Banks advancement from Commander to Captain. Banks replied to the adverse report expressing his objection.

On January 10, 1986, after the initiation of this lawsuit, the adverse fitness report was removed from Plaintiff's records voluntarily by the Navy on the ground Rinard was not in a position to write it. His immediate superior agreed Rinard was not in a position to write it.

Subsequently, Banks petitioned the Navy's Board of Correction of Naval Records for relief. The fitness report that was removed from his official record mysteriously reappeared and formed the basis for a denial of his claim.

In early 1984, the Navy Investigative Service conducted an investigation into the entire letter writing incident. This investigation consisted of interviews of many members of the squadron concerning Banks' alleged misconduct. Banks'

position is that the investigation was done to harass him. The Navy has refused to disclose how this investigation started. The investigation lead to nothing.

Subsequently, Banks was the subject of further harassment. He was asked to sit on an A-7 flight investigation board. When Admiral Rinard learned of it, Banks was removed from the board.

As it turned out, Banks' concerns were well justified. The Navy issued an ALNAV in February, 1984, delaying the delivery of new FA/18 aircraft to VFA-303 and having VFA-303 personnel augment the regular Navy squadron at Lemoore, VFA-125. The new FA/18 aircrafts were not delivered to VFA-303 until September, 1986. VFA-303 served only as an augmentation unit until May, 1986.

Banks filed an action in U.S. District Court for the Eastern District of Virginia on January 22, 1986 for mandamus and declaratory relief that the Navy's actions against him violated the First Amendment, 10 U.S.C. §1034 and 42 U.S.C. §1983, and therefore he was entitled to back pay for the time he was not allowed to work, and damages for the violation of The Privacy Act under 5 U.S.C. §552a(e) by the Navy in maintaining a secret file containing the negative fitness report.

On July 29, 1988, after the Government filed a Motion To Dismiss the district court dismissed Banks' claims under the Privacy Act, 5 U.S.C. §552(a)(e)(7).

On October 27, 1988, after the filing of another Motion To Dismiss, the district court dismissed Banks' claims under the Little Tucker Act, 28 U.S.C. §1346(a)(2).

After a one day trial on the declaratory relief cause of action, the court on February 1, 1989, granted the Navy's motion to dismiss the remainder of the complaint on the ground that upon the facts and the law Banks had shown no right to relief.

The U.S. Court of Appeals for the Federal Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. WHETHER A MILITARY RESERVIST WHILE NOT IN A DUTY STATUS HAS THE FIRST AMENDMENT PROTECTION OF A CITIZEN TO WRITE TO MEMBERS OF CONGRESS CONCERNING GOVERNMENT WASTE IS A SPECIAL AND IMPORTANT QUESTION OF FIRST IMPRESSION FOR REVIEW BY THE U.S. SUPREME COURT.

A. The cases relied on below do not consider the special circumstances of an off duty reservist.

There is no precedent other than the decision below in this case on the issues presented in this case for review by the U.S. Supreme Court. The crux of this case is the Navy establishment's punishment of a military reservist, Captain Banks, for writing a letter to members of Congress concerning their attempts to undermine a previous cost saving measure adopted by the Navy and approved by Congress. He wrote the letter while not in a duty status and after he attempted to go through the regular Navy chain of command. Captain Banks expressed concern in the letter that Congress' previous authorization to transfer new FA/18 aircrafts to his reserve squadron for the first time instead of to the regular Navy

squadron had not been carried out and was in danger of never being implemented by the regular Navy.

The Respondent Secretary of the Navy asserts that under Article 1149 of Navy Regulations, the Navy has the unfettered authority to cut off a military reservist's First Amendment right to express his views to members of Congress even when the reservist is not in any duty status and has unsuccessfully attempted to go through the chain of command. According to Respondent the federal statute (10 U.S.C. §1034), and formerly identical Navy Regulation (Article 1148), which are intended to protect against such chilling, all pervasive exercises of authority, have no affect to protect Captain Banks' action. Further, the Respondent asserts the Navy has the authority to maintain secret records on this exercise of First Amendment rights by a military reservist in direct contravention of the Privacy Act.

Finally, and most egregiously, the Navy asserts it may take punitive action against a reservist for their exercise of First Amendment rights without affording him any due process as provided under the Navy's own regulations. The unlawful punitive action against Captain Banks consisted of: (1) relieving him of his command; (2) transferring him to a non-pay -- non-mobilizable VTU Unit from a pay mobilizable Unit; (3) subjecting him to a Naval Investigative Service investigation; (4) issuing and maintaining secret an unsatisfactory fitness report solely for writing the letter to Congressmen; and (5) removing him from sitting on a flight accident board concerning an aircraft of which he was very familiar. In this case the Navy took such action against reservist Captain Banks while members of the regular Navy establishment actively and personally lobbied Carl Smith, who was then a staff member with the Senate Armed Services Committee, to reverse the previous authorization to provide new FA/18 aircrafts to Captain Banks' squadron. The

Navy paid no attention to this conduct by regular Navy personnel, yet "threw the book" at reservist Captain Banks.

Under Rule 17 of the U.S. Supreme Court Rules, a petition for Writ of Certiorari is granted when there are special and important reasons therefor such as ". . . a Federal Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court or has decided a Federal question in a way that conflicts with the applicable decisions of this Court." Rice v. Sioux City Memorial Park Cemetery, Iowa 349 U.S. 70 (1955). The principles involved must be of importance to the public, as distinguished to that of merely the parties. Id. The Federal question involved should be novel. Kossick v. United Freight Company, New York 365 U.S. 731 (1961), rehearing denied 366 U.S. 941.

The issue of whether an off-duty military reservist can be stripped of First Amendment rights and severely punished if he exercises such rights has never been addressed by the U.S. Supreme Court. It is a novel question of considerable public importance. Respondent cited no cases involving off-duty reservists. All the cases relied on involved active duty regular military personnel. The precedent relied on by the Federal Circuit addressed only active duty, regular military personnel.

Finally, the trial court below relied heavily in its decision on Goldman v. Weinberger 475 U.S. 503 (1986) in supporting its decision. The Goldman case, and any other cases cited by the court below in its opinion, are simply not on point. Not only was there no specific statute such as 10 U.S.C. §1034 to protect Goldman, but all of the cases involve situations where the Plaintiff was on active duty and in a duty status, and wearing a uniform. In this case, Banks was not in a duty status. He was free to exercise his First Amendment rights, he was not in Naval service in any sense that he might forfeit his Constitutional rights

and therefore, Article 1149 of the Navy Regulations did not apply to him.

Further, this Court should examine whether Goldman should be applied to whistleblowers. Whistleblowers inherently are contra to the military principles of ". . . instinctive obedience, commitment and esprit de corp." Goldman, supra at 503. Yet Congress has already expressed its intent in 10 U.S.C. §1034 that the free flow of information, whether critical of the military or not, takes precedence over the military principles upheld in Goldman.

B. Reservists' constitutional and statutory rights are important federal questions in light of public policy to use the reserves to foster efficiency and defense cost savings while maintaining defense preparedness.

The First Amendment rights of military reservists is an important public question today because of the critical public policy to improve efficiency and cut defense spending in order to reduce the overwhelming Federal deficit, while at the same time maintaining national defense preparedness. The reserves afford citizens an opportunity to serve our country and bolster national defense preparedness at less cost to taxpayers. The public policy is to encourage participation in the reserves as demonstrated by Congress' action to appropriate funds to provide new FA/18 aircrafts to Captain Banks' reserve squadron. This action was considered a sign that Congress desired to bolster confidence in the reserve system. However, the decision in this case puts a damper on the encouragement and growth of participation in the reserves. If Articles 1149 of Navy Regulations is applied as broad sweeping as the Federal Circuit has done in this case to override 10 U.S.C. §1034, confusion as to the constitutional and statutory rights and military obligations

of reservists will persist and a chilling effect on qualified citizens serving in the reserves will result. Clearly, this is an undesirable and unconstitutional result. This court presents the last resort for a hearing on the First Amendment and statutory issues presented by Captain Bank's claims.

II. REVIEW OF THE DEGREE OF PROTECTION OF WHISTLEBLOWERS IN THE MILITARY IS AN IMPORTANT AND SPECIAL REASON FOR GRANTING THE WRIT IN THIS CASE.

A. Federal statutory protection (10 U.S.C. §1034) for Whistleblowers.

Captain Banks, in writing his letter to members of Congress, acted as a military whistleblower. He sought to bring to the members attention the Navy's foot-dragging and/or possible reversal of a previously approved, cost-saving defense project to provide topflight, first class training to lower cost reserves on new FA/18 aircraft.

There is express federal statutory protection for military whistleblowers by virtue of 10 U.S.C. §1034 which read as follows in 1984:

> No person may restrict any member of an armed force in communicating with a Member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

The exact same language is contained in Navy Regulation, Article 1148 under the heading "Dealing with Members of Congress."

To further bolster the protection of military whistleblowers Congress amended Section 1034 in 1988. As amended, Section 1034 was significantly strengthened by the 100th Congress in 1988 by imposing absolute restrictions against persons restricting an armed service member from communicating with a member of Congress and by providing specific measures for administrative relief.

Banks' outset position is that his action was clearly protected by the 1988 change in 10 U.S.C. §1034, particularly in view of its legislative history. The clear impact of this amendment demonstrates that Congress was quite upset by past incidents of military punitive actions against servicemen who communicated abuse, fraud and other wrong doings in the military to Congressmen.

Admittedly, the legislative history contains the following: "The amendment to section 1034 of title 10, United States Code, made by subsection (a)(1), shall apply with respect to any personnel action taken (or threatened to be taken) on or after the enactment of this Act as a reprisal prohibited by subsection (b) of that section." Act Sept. 29, 1988, P.L. 100-456, Div. A, Title VIII, Part D., §846 (d), 102 Stat. 2030.

Nevertheless, it is clearly people like Banks that Congress thought should be protected by 10 U.S.C. §1034. The amending language essentially continues the prohibition of military interference with servicemen who write Congressmen. It simply gives servicemen a specific remedy rather than protracted, expensive, and as this case exemplifies, uncertain judicial remedies available to them. The Conference Committee Report states as follows:

"Safeguarding military whistleblowers (sec. 846)

The House bill contained a provision (sec. 810) that would protect lawful communications by military personnel to a Member of Congress or an Inspector General in the Department of Defense. The House bill would prohibit retaliatory personnel actions as a reprisal for such a communication, require an investigation by the DOD Inspector General of certain allegations, and provide statutory guidance of the Boards of Correction of Military Records in viewing all allegations of such reprisals.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment which clarifies the rights protected by this provision and revises the review and reporting procedures.

The conferees note that in the course of their duties, members of the Armed Forces may become aware of information evidencing wrongdoing or waste of funds. It is generally the duty of members of the Armed Forces to report such information through the chain of command. Members of the armed forces, however, have the right to communicate directly with Members of Congress and Inspector Generals (except to the extent that a communication is unlawful under applicable law or regulation), and there may be circumstances in which service members believe it is necessary to disclose information directly to a Member of Congress or an Inspector General. [underlining added] When they make lawful disclosures, they should be protected from adverse personnel consequences (or threats of such consequences), and there should be prompt investigation and administrative review of claims of reprisals. When such a claim is found to be meritorious, the Secretary concerned

> should initiate appropriate corrective action, including disciplinary action when warranted.
>
> It is the intent of the conferees that the Secretaries of Defense and Transportation implement this section in a manner consistent with the Inspector General Act of 1978 and the Uniform Code of Military Justice." Act Sept. 29, 1988, P.L. 100-456, Div. A, Title VIII, Part D, §846(e).

As noted in the Conference Committee Report, the House spearheaded the bill. The sense of the House Committee hearings on the bill manifests Congressional approval of actions like Banks took.

Representative Charles E. Bennett of Florida, Chairman, Seapower and Strategic and Critical Materials Subcommittee stated:

> I want to congratulate Mrs. Boxer and the Chairman of the committee, and the total military structure, civilian and otherwise, in coming to grips with this issue, because it is really a very important issue when people express concerns about things that are not going just right. They may be right or wrong, the people that raise the criticism, but they ought to be encouraged, not discouraged, and people ought to know that people like constructive and creative thinking, and every time we get an opportunity to give an accolade to people that have that kind of courage, we ought to do it.

Whistleblower Protection in the Military, Hearing Before the Acquisition Policy Panel of the Armed Services of the Committee on Armed Services, House of Representatives [H.A.S.C. No. 100-42, November 19, 1987, page 1]

Representative Nicholas Mavroules of Massachusetts, Chairman, Acquisition Policy Panel said:

> This morning the panel on Acquisition Policy meets to receive testimony on the protection afforded to members of the military services who step forward with information on waste, fraud or wrongdoing in the military. These individuals are frequently referred to as "military whistleblowers." In fact, "whistleblower" may be too simplistic a description.
>
> More correctly, those from the military services who step forward with information on a range of problems provide Members of Congress with a real service. Nothing is more important to this panel, nor should it be to the Department of Defense, than candid and direct information. Without such candid and direct information, for instance, it would have been impossible for the House Armed Services Committee to develop the full facts associated with the B-1B program or the MX Inertial Measurement Unit.
>
> A member of the military, whether he be a petty officer, sergeant or a general, should never feel threatened by stepping forward with the facts. Yet, there are instances where members of the military are reluctant to step forward for fear of retaliation or retribution. No serviceman or woman should ever be forced to compromise their honesty, integrity or, for that matter, their career.

Whistleblower Protection in the Military, supra, pages 1-2.

Representative Barbara Boxer of California said:

There is a basic disagreement, at least with this Member and the Pentagon over how well the current system is working. When I hear from Mr. Vander Schaaf the small number of cases that are coming forward, I could say that I, as one Member of Congress, could better than double those cases, people who have felt that they were wronged.

So something is not working, and I think, Mr. Chairman, the main reason that, we in my opinion, put forward legislation such as this is to put into play a deterrent, a deterrent, because you are so right, Dr. Johns [the previous witness]. We are not going to change a culture. It is very difficult to do that unless the military itself decides they want to do that. I hope some day they will, but in the meantime there are people who are put into psychiatric wards, there are people who are discriminated against, have their careers ruined.

No matter whether it is five, ten, or twenty, or one hundred, we are really not sure. We know it is happening out there. It seems to me that the people that are inflicting that kind of injustice on these individuals should know that there is a penalty involved if they are doing that and they are not right in doing that, and that is why we talk about a deterrent.

Whistleblower Protection in the Military, supra, page 131.

B. Failure of the Federal Circuit to consider the federal interest in protection of military whistle-blowers.

The Federal Circuit completely ignored the legislative intent of 10 U.S.C. §1034 and failed to consider the whistleblower content of Banks' letter. In the Federal Circuit opinion below at footnote 1 the court opines that the amendment to 10 U.S.C. §1034 is not retroactive and therefore "is not applicable to this appeal, and we intimate no disposition whether Article 1149 is invalid under section 1034, as amended. That issue is for another day." Banks v. Garrett, Civil No. 89-1485, slip op. at 6-7, footnote 1 (Fed. Cir. April 20, 1990).

This conclusion of the Federal Circuit is incomprehensible. "That issue" of whether Article 1149 is invalid under section 1034 as amended, is squarely before the court in this case. Clearly, the legislative intent of Section 1034 has always been to protect military whistleblowers. The 1988 amendment merely added certain remedies. Banks is not asking for those remedies. However, he is asking for the protection of his conduct that Section 1034 is intended to afford.

The Writ should be granted in this case in order to examine these significant questions as to whether Navy Regulation Article 1149 on its face and as applied to Petitioner who was a reserve officer in no duty status is constitutional under the First Amendment and 10 U.S.C. §1034 which is embodied within Navy Regulation Article 1148.

With respect to the issue of inference of retroactivity of an amendment to a statute, it is true that generally retroactivity is not inferred, See, Sea-Land Service, Inc. v. United States, 493 F. 2d 1357, 1369 (1974). However, there is no final judgment in this case and this Court may and should seriously consider the

1988 change in 10 U.S.C. §1034 and the reasons therefor. See Bradley v. School Board of Richmond, 416 U.S. 696 (1973); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969).

III. THE FEDERAL CIRCUIT'S ANALYSIS OF THE APPLICATION OF ARTICLE 1149 TO PETITIONER CREATES A CONFLICT BETWEEN CIRCUITS AND WITH A FEDERAL STATUTE.

A. Banks was not a public employee under 5 U.S.C. §2105(d) and Woods v. Covington County Bank, 537 F. 2d 804 (1976).

The Federal Circuit opines that the "trial court properly balanced the First Amendment interest of Banks, as a public employee, against the government employer's interest. . ." Banks, slip. op. at 10.

In another part of the opinion where the court is reviewing the trial court's analysis of the application of the phrases "in his official capacity" and "person in the naval service" to Captain Banks under the circumstances of this case it holds the trial court's finding he acted in his official capacity is "not clearly erroneous" and that "Banks has shown no authority for construing that phrase [person in the naval service] so as to exclude reserve officers in reserve units." Banks, slip. op. at 9.

Apparently the Federal Circuit did not consider Petitioner's citation of 5 U.S.C. §2105(d) which reads as follows:

> (d) A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the

> United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

See also, Woods v. Covington County Bank, 537 F. 2d 804, 810-811 (1976) and 45 Comp. Gen. 405.

Banks' status is further reflected in 45 Comp. Gen. 405 which states:

> Section 29(d) of the Act of August 10, 1956, ch. 1041, 70A Stat. 632, 5 U.S.C. §30r(d) [now 5 U.S.C. §2105(d)], provides that when a reservist is not on active duty for training, he "is not on active duty, or when he is on active duty for training, he "is not considered to be an officer or employee of the United States or a person holding an office of trust or profit or discharging any official function under, or connection with, the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

Despite this authority the Federal Circuit concludes apparently that because Banks held a Reserve commission, he was subject 24 hours a day, 365 days a year, to the restraints applied by Article 1149 of Navy Regulations (and by extension, many other Articles of Navy Regulations). This argument, although accepted by the trial court and the Federal Circuit is at odds with the leading case involving the rights of Naval Reservists. See Woods v. Covington County Bank, supra at 810-811. Under Woods a reservist while not on active duty is not a public employee. Id at 810-811. Even if you consider Banks status just prior to his writing the letter, he was on duty for

training only. Such reservist training duty does make him a public employee under 5 U.S.C. §2105(d).

This Court must grant this writ and determine whether it was erroneous to treat Petitioner as a "public employee," contrary to applicable law and precedent. The treatment of Banks as a public employee creates a conflict between the Circuits in light of Woods. This Court should resolve the conflict.

B. Analysis in the court below of whether Banks acted "in his official capacity" requires review also.

On the issue of whether Banks wrote his letter "in his official capacity" as referred to in Article 1149 of Navy Regulations, the Federal Circuit affirmed the determination of the trial court below. The trial court below cited the fact that Banks used Navy letterhead and signed and referred to his title as Commander of his squadron. Banks, slip. op. at 9.

Petitioner respectfully submits that "official capacity" means a great deal more than these superficial facts. These facts should not be controlling and dispositive of the important First Amendment rights at stake here.

If one understands that the institution of Congress and individual Congressmen are different entities, then it should also be understood that Navy Regulation, Article 1149 does not bar use of official letterhead in letters to members of Congress, just as it does not bar communicating with members of Congress from a telephone located on military base or talking to them while in uniform as this Court knows, which is the practice of the military in Washington, D.C.. Moreover, at oral argument on appeal the Navy stated that the decision to fire Banks would have been the same whether Navy letterhead was used or not,

since the mere writing of the letter in the form written, was contrary to "good order and discipline."

Banks' letter, cannot be considered in a vacuum. It is submitted that no one who has dealt with the government (and the district court below did not question the matter) would for a minute consider that Congressmen receiving Banks' letter were misled into thinking that Banks was communicating to them, much less to Congress, in behalf of an institution [the Navy] in his official capacity.

It should also be noted that even if Banks had been ostensibly communicating "in his official capacity," more is required to violate U.S. Navy Regulation, Article 1149. To violate such Article, five elements are involved; (1) Banks must be "a person in the Naval service" within the meaning of that Article; (2) He must be acting in his official capacity; (3) He must "apply" to: (a) The Congress, or (b) either House thereof, or (c) any Committee thereof; (4) The application must be for: (a) legislation or (b) appropriations or (c) Congressional action of any kind; and of course (5) it must be without consent and knowledge of the Secretary of the Navy.

In summary, taking these (except (5) up in order, it is clear that:

(1) At the time Banks acted, he was not within the meaning of Article 1149, "a person in the Naval Service." He was not in any duty status at the time he sent the letters to members of Congress. The uncontroverted testimony at trial was that Banks wrote and sent the letters after he completed his drill duty.

(2) As indicated above, none of the addressees would considered Banks was acting "in his official capacity."

(3) Banks did not apply to, or for anything, as such. The word "apply" connotes asking or soliciting for something specifically, some action. He certainly did not apply to "the Congress," but rather wrote to members of Congress and the same is true respecting "either House thereof" or "any Committee thereof."

(4) Banks did not ask for legislation or for appropriations, or even ask for any "Congressional" action. He offered information on the lack of follow through on past Congressional action. At most, he invited the Congressmen concerned to call him if they had any questions on the subject. " Congressional actions" relate to actions from a formal assembly of Congressmen and an invitation for a Congressman to call him hardly qualifies as applying for any type of Congressional action.

What Article 1149 is really intended to prohibit -- and all that makes any sense -- is the palming off by some Naval official of an institution (Navy) to institution (Congress) communication, which the Banks' letterhead or reference to his title could not do.

The response of the Navy was a knee jerk and get rid of him attitude as evidenced by the failure of the Secretary of the Navy to even respond to the official letter. As Representative Barbara Boxer said in her Whistleblower statement, supra, "Something is not working." There were any number of ways the Navy could have responded to the letters besides relief from command, assignment to a non-pay unit, a Naval Investigation Service Investigation and a lousy fitness report, all of which were punitive.

Only this Court may now properly analyze the issue giving appropriate consideration to the broader issue of the special First Amendment protection afforded a whistleblower.

IV. OTHER IMPORTANT ISSUES SUCH AS INCONSISTENT TREATMENT OF WHISTLEBLOWERS, DUE PROCESS, PRIVACY ACT RIGHTS AND BANKS' RIGHT TO BACK PAY ARISE FROM THE PRIMARY FIRST AMENDMENT QUESTION RAISED IN THIS CASE.

A. Can the Navy selectively enforce regulations to punish whistleblowers?

The courts below refused to even consider the inconsistent regulatory treatment the Navy was applying to Banks.

While it was clear that active duty members of the Navy were lobbying Carl Smith to get the Senate Armed services committee to change its mind concerning the giving FA/18's to reservists, and this was a fact known by Secretary of Navy Lehman, Admiral Kempt and Admiral Rinard, they nevertheless sought to ignore these efforts at lobbying and instead, to focus their wrath on a reservist, Banks, who, acting as a whistleblower, thought he was doing the right thing in the right way.

The court below refused to understand, or even consider, or even admit evidence concerning the dual standard the Navy was applying with respect to Banks on one hand, and regular Navy officers on the other hand. The court gave no recognition to the special protection afforded whistleblowers under 10 U.S.C. §1034.

As we noted in our statement of the case, Banks' concern resulted from rumors which were the result of a shifting position in the Department of the Navy. It is clear enough that the shifting position was the result of the regular Navy who was continuously lobbying Carl Smith, who was at that time on the staff of the Senate Armed Services Committee. The lobbying effort of the regular Navy establishment with respect to Carl Smith, resulted in action which delayed for more than two years VFA-303 from receiving aircraft. Banks' efforts to the members of Congress was different only in that it was in writing as compared to that of his regular Navy counterparts who were very effective in their verbal, personal lobbying. They were not the victims of any immediate relief or transfer from command to a non-pay billet. This selective enforcement of a whistleblower is a special question which should be reviewed by this Court.

B. The Navy did not follow its own rules providing due process when it removed Banks.

As we have continually noted, it is the Navy's position that Banks was in Naval service at the time he wrote the letter, and therefore, was subject to the full implementation of Article 1149 of Navy Regulations. Although the Navy has taken the position that Banks was in every way subject to Navy Regulations, the Navy itself failed to follow its own rules as set forth in the Navy Military Personnel Manual.

§3410100 thereof concerns officer performance. §5 of that section, which appears at 34-3 in the July 1982 edition, provides for stringent rules for relief for cause. That section begins:

> "a. The detachment of an officer for cause is the administrative removal of an officer from his or her current assignment by reason of misconduct,

unsatisfactory performance of duty, or marginal performance of duty.

b. Detachment for cause is one of the strongest administrative measures used in the case of officers...."

Exact procedures are set forth in paragraph 5 concerning the detachment for cause. Included in the section under 5(b)(f)(1) is a statement as follows: "A statement of the officer whose detachment is requested is required by Navy Regulations." Banks was given no such opportunity to make a statement at the time he was removed from command and transferred. Even though Navy Regulations were allegedly being applied to him, the Navy sought not to grant Banks the due process provided under these rules with respect to Banks' detachment.

Subsection f(5) appearing at page 34-6 states: "The officer concerned should be afforded a reasonable period of time, normally ten working days, in which to prepare his or her statement to the detachment for cause request. Specific requirements of the statement of the officer concerned are delineated below."

The Navy Military Personnel Manual thereafter indicates in detail what the officer's statement should contain and more importantly what the detachment for cause request should contain.

The Navy takes the position that the transfer of Banks from a pay unit as commanding officer, to a non-pay unit in a voluntary training unit did not require the following of the procedure set forth in the Manual. Nevertheless, in contrast, they seek to assert that Navy Regulations Article 1149 is all

pervading, and that Banks had to follow that regulation while the Navy need not follow its own Military Personnel Manual or Navy Regulations. Banks offered the Navy Military Personnel Manual version of July 1982 in evidence in the court below, but the Navy objected. Banks believes that the Navy Military Personnel Manual with respect to detachment of officers is applicable to Banks if it is the Navy's position that Navy Regulation Article 1149 is also applicable to him.

Further, the Navy did not even follow its own instructions concerning transfers and termination of officer assignments. The key instruction is CNAVRES INST 1001.1c of November 20, 1980. Chapter 2, section B2101 requires under paragraph (6) on any individual transfers as follows: "(6) When an officer is transferred from a drill pay to a non-drill pay status, he/she will be mailed a letter informing him/her of this transaction prior to the effective date of transfer." In the instant matter, Banks was immediately terminated and transferred to the VTU without notification required pursuant to CNAVRES inst. 1001.1c, without the Navy ever following CNAVRES inst. 1001.1c.

The Navy cannot have it both ways. It cannot on one hand say that Banks was in Naval service and he can be relieved from command, and this was not punitive, and at the same time, not follow its own regulations with respect to the relief from command of persons in the Naval service.

C. The making and maintaining of the secret negative fitness report on Captain Banks' exercise of his First Amendment rights constitutes a violation of the Privacy Act.

It is undisputed that an offending Fitness Report and other related papers were placed in Banks' Naval records and, while they were later removed, they were subsequently retrieved for

the purposes of Banks' case before the Board for Correction of Naval Records. Admiral Kempt testified at trial you could never undo a record.

Under the circumstances, 5 U.S.C. §552a(e)(7) appears to have been directly violated. There is no suggestion by the Navy that the exceptions of this provision apply. The action unquestionably has had an adverse effect on Captain Banks, and it can hardly be denied that the violation was intentional or willful. But the latter facts were never considered in a trial in view of the lower court's preemptory dismissal of Plaintiff's Privacy Act Claim. This subsidiary issue flows from the primary First Amendment issue involved and is a significant issue warranting this Court's review.

D. The wrongful removal of Banks from his commanding officer position without due process and for the reason that he exercised First Amendment rights supports his claim for back pay of which the district court had jurisdiction pursuant to the Little Tucker Act.

The Federal Circuit held that the trial court properly dismissed Captain Banks' Little Tucker Act Claim because Banks failed to state a claim under the Little Tucker Act. Banks did not demonstrate a substantive right to payment by the United States separate from 28 U.S.C. §1346(a)(2). This ruling ignores the most important issue in this case. Captain Banks was removed from his position as commanding officer of VFA-303 for exercising his First Amendment right by writing a letter to Congressmen concerning an issue of possible waste and with which he was greatly concerned – the denial of new FA/18 aircraft to his reservists unit. This ruling is contra to O'Hanlon v. United States, 11 Ct.Cl. 192, 198 (1986) wherein that Plaintiff, like Banks, was transferred from a pay to a non-pay

status in the Selected Reserve and the Claims Court's jurisdiction to consider the legality of this action was recognized. O'Hanlon held a "fiction" is recognized whereby an individual lawfully appointed to a federal position whose removal (or transfer) from that position contravened pertinent statutes or regulations is deemed to have never been removed (or transferred) from his position. United States v. Wickersham, 201 U.S. 390 (1906). Id. at 198.

Accordingly, in view of O'Hanlon, the Federal Circuit was in error to uphold the district court's dismissal of the Little Tucker Act claim.

Further, a careful reading of the case cited in the court below, United States v. Testan, 424 U.S. 392 (1976) on page 402 reveals that this Supreme Court specifically distinguished the situation in the case at hand involving a removal from the situation in Testan which involved a promotion. Testan applied only to promotions, not to removals in this case. Therefore Testan is not controlling.

In this case there is no reason to believe that Captain Banks would not have attended drills and otherwise performed his duties as Commanding Officer of VFA-303 if he had not been removed from his position in pay status for having exercised his First Amendment right to write letters to Congressmen concerning an issue with which he was greatly concerned. Banks in fact performed drills wihtout pay. Both the district court below and the panel hearing this case on appeal took the position that Banks had to drill to be entitled ot relief under the Little Tucker Act. Banks did in fact drill without pay in a voluntary training unit after being fired for writing Congress and did the drills he would have doen in a pay status as Commanding Officer. Therefore, he performed the drills and he should have been paid for his work.

Under these circumstances his entitlement to pay for active duty for training was authorized by 37 U.S.C. § 204(a)(2) and his drill pay was authorized by 37 U.S.C. § 206. These pays for Captain Banks, in terms of the above language of Testan, are emoluments of his position to which he is entitled. These are specific statutes which authorize the pay that Captain Banks would have received except for his wrongful removal and for exercising his First Amendment Rights.

This is an issue of first impression requiring review by this Court. This is not a case where the claimant refused or failed to perform acts for which he is requesting payment. This is a case where the reservist was prevented from performing his duties by the wrongful act of the Navy. O'Hanlon supports Banks' back pay claim under these circumstances.

V. CONCLUSION

The Federal Circuit summarily rubber-stamped the trial court decision supporting the position presented by the Navy in this case without any thorough, reasoned consideration of the application of broad First Amendment constitutional principles to Captain Banks' writing of a letter concerning military waste to members of Congress, and the Navy's subsequent punishment of him for the letter. The opinion does not offer a constitutional analysis of Article 1149 of Navy Regulations on its face or as applied to an off duty reservist.

Nor does it consider the whistleblower content of Banks' letter and the special protection afforded military whistleblowers under 10 U.S.C. §1034. This case presents these novel issues for review by this Court. They are special and important issues of first impression which warrant review. For these reasons the writ in this case should be granted.

Respectfully Submitted by,

Penrose Lucas Albright,
Attorney for Petitioner,
Richard A. Banks

APPENDIX A

INDEX TO APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD A. BANKS,	)	Civil Action No.
	)	86-0923-A
	)	
Plaintiff,	)	Filed July 29, 1988
	)	
v.	)	
	)	
JOHN LEHMAN, Secretary of the Navy,	)	
	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) that the defendant Secretary of the Navy's Motion to Dismiss, or in the Alternative for Summary Judgment is DENIED, except as to defendant's Motion to Dismiss Plaintiff's Privacy Act Claim which is GRANTED.

(2) that the Clerk shall forward copies of this Order to all counsel of record.

July 29, 1988
Alexandria, Virginia

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD A. BANKS,	)	Civil Action No.
	)	86-0923-A
	)	
Plaintiff,	)	Received
	)	September 9, 1988
v.	)	
	)	
WILLIAM L. BALL, III, Secretary of the Navy,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of the plaintiff's Motion for Reconsideration and the defendant's Partial Cross-Motion for Reconsideration, and after reviewing the briefs, it is accordingly ORDERED:

(1) that the plaintiff's Motion for Reconsideration is DENIED;

(2) that the defendant's Partial Cross-Motion for Reconsideration is DENIED;.

(3) that the Clerk shall forward copies of this Order to all counsel of record.

September 2, 1988
Alexandria, Virginia

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD A. BANKS,	)	Civil Action No.
	)	86-0923-A
	)	
Plaintiff,	)	Received
	)	November 3, 1988
v.	)	
	)	
WILLIAM L. BALL, III,	)	
Secretary of the Navy, in his	)	
official capacity,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of the Defendant, Secretary of the Navy's Motion to Dismiss Plaintiff's Tucker Act Claim, and after reviewing the pleadings, authorities, and arguments of counsel, and the court being of the opinion that the court lacks jurisdiction in accordance with United States v. Testan, 424 U.S. 392, 96 S. Ct. 948, 47 L.Ed 114 (1976) and Adair v. United States, 648 F.2d 1318 (Ct. Cl. 1981), it is accordingly ORDERED:

(1) that Defendant, Secretary of the Navy's, Motion to Dismiss Plaintiff's Complaint Seeking Damages Under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), is GRANTED on the grounds of lack of jurisdiction;

(2) that the Clerk shall forward copies of this Order to all counsel of record.

October 27, 1988
Alexandria, Virginia

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD A. BANKS,	)	Civil Action No.
	)	86-0923-A
	)	
Plaintiff,	)	
	)	Filed
v.	)	February 1, 1989
	)	
WILLIAM L. BALL, III,	)	
Secretary of the Navy,	)	
Defendant.	)	
	)	
	)	
	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is accordingly ORDERED:

(1) that the defendant's Motion to Dismiss is GRANTED. The plaintiff's Complaint is DISMISSED with prejudice.

(2) that the Clerk shall forward copies of this Order to all counsel of record.

February 1, 1989
Alexandria, Virginia

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD A. BANKS,	)	Civil Action No.
	)	86-0923-A
	)	
Plaintiff,	)	
	)	Filed
v.	)	February 1, 1989
	)	
WILLIAM L. BALL, III, Secretary of the Navy,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This matter is before the court on the plaintiff's Complaint seeking a declaratory judgment that Article 1149 of Navy Regulations be declared unconstitutional in violation of the First Amendment and declared unconstitutional in violation of the First Amendment and be declared not applicable to the plaintiff, Richard A. Banks ("Banks") as a Naval reservist.[1]

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[1]. This case was transferred on August 1, 1986 from the United States District Court for the District of Columbia to the United States District Court for the Eastern District of Virginia.

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure defendant moves for dismissal of plaintiff's action on the grounds that upon the facts and the law plaintiff has shown no right to relief.[2] For the reasons set forth below, the defendant's Motion is granted.

I.

The court adopts the party's Stipulation of Uncontested Facts and in addition finds the other relevant facts to be as follows:

Plaintiff, Richard A. Banks, ("Banks") served on active duty as a Naval aviator, commencing in December, 1966 and continuing until December, 1971. Following his tour of extended active duty, plaintiff continued to serve as a Naval aviator in the U.S. Naval Reserve. Plaintiff's Naval record includes 126 missions of combat flying during the Vietnam War. (Plaintiff's Proposed Findings of Fact ¶ 1).

The defendant, William L. Ball, III, is the Secretary of the Navy and is being sued in his official capacity.[3] However, during all periods material to this case, the Secretary of the Navy was John F. Lehman ("Lehman"). (Lehman Dep. at 6).

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[2]. On July 29, 1988 this court dismissed plaintiff's claim under the Privacy Act 5 U.S.C. § 552a(e)(7). On October 27, 1988 this court dismissed the plaintiff's claim under the Little Tucker Act 28 U.S.C. § 1346(a)(2).

[3]. The action as originally filed also named the Secretary in his individual capacity. Plaintiff's Complaint was subsequently amended naming the Secretary as a party only in his official capacity.

Effective July 25, 1983 Banks assumed command of VFA-303. His assignment was approved by the Commander of the Naval Reserve Forces, Rear-Admiral T. F. Rinard, United States Naval Reserve ("Rinard"). (Stip. of Fact ¶ 3, Plaintiff's Exh. 1, Testimony of Rinard).

VFA-303 was designated as the first Naval Reserve Aviation Squadron to receive the new F/A-18 Hornet ("Hornet") aircraft. (Lehman Dep. at 18, Testimony of Banks).

The transition to allow Naval Reserve Squadrons to use new aircraft like the Hornet was a part of the Navy's "Horizontal Integration, [program] which was to modify the reserve forces with the latest equipment so they could both mobilize immediately and bear the peacetime burden on a day-to-day basis with active forces." (Lehman Dep. at 9, Testimony of Banks, Testimony of Rinard).

Banks was initially informed that the new Hornet aircraft would be delivered in April, 1984. The April delivery date was subsequently changed to June of 1984. (Testimony of Banks).

The delay in delivery was occasioned by the opposition of a Senate Arms Service Committee staffer, Carl Smith, to any Naval Reserve squadrons receiving Hornets prior to the active duty units. (Lehman Dep. at 20-21).

As of December, 1983 Banks had heard rumors that the planned delivery of the Hornets to the reserve units was to be canceled. (Defendant's Exh. K).

In late December, 1988 Banks discussed his concern about the rumors with his immediate superior, Captain Thomas B. Latendresse, U.S.N. Commander, Carrier Air Wing Reserve THIRTY. Banks discussed the possibility of sending letters

about his concern to members of Congress. Latendresse told him to give it a try, but he also told him to "be careful." (Testimony of Banks).

In December, 1983 Banks forwarded an official letter to the Secretary of the Navy via his chain of command expressing his concerns. Banks' letter was returned to him by Rear Admiral Rinard for the inclusion of additional addresses. The letter was corrected and sent out again. Banks never received a reply from the Secretary. (Defendant's Exh. A at 3, Testimony of Rinard).

In late December, 1983 or early January, 1984 Banks called Rinard regarding the delays in receiving the Hornets. Rinard assured Banks that his squadron's training schedule, to prepare for receipt of the aircraft, was still on track. However, Rinard informed Banks that there were some uncertainties as to when Banks' squadron would be receiving the new Hornets. Banks discussed the idea of writing members of Congress with Rinard. Rinard advised Banks that he could write as a private citizen or use a procedure through the Navy chain of command. Rinard counselled Banks against writing in his official capacity. (Testimony of Rinard, Defendant's Exh. A at 4).

Commander Banks drafted the letters dated January 6, 1984 to members of Congress. Certain VFA-303 military personnel prepared one copy for each of the twelve to fifteen members of the House of Representatives and Senate Armed Services Committees. Commander Banks authorized one of his subordinate officers in the squadron to sign his name to the letters and to mail them. Although Commander Banks did not personally sign the letters, he does not deny and assumes full responsibility for their issuance. (Testimony of Banks; Stip. of Fact ¶'s 4, 5; Defendant's Exh. A at 5).

The letters, addressed to the members of Congress, were typed on official Navy letterhead. The letter began: "As the Commanding Officer of Strike Fighter Squadron THREE ZERO THREE I would like to draw your attention to the possibility that the current planned transition of this command to the F/A-18 aircraft is in jeopardy." Through the letters Banks was attempting to point out what he saw as a problem and obtain support from Congress. In addition, Banks included his home and office telephone numbers, volunteered his presence in Washington if the congressmen deemed it necessary, and signed the letter "R. A. Banks, Commanding Officer." (Defendant's Exhibit I).

Banks also urged other members of his Squadron to write letters to Congressmen. (Defendant's Exh. A at 5, Defendants Exh. K).

One of the letters had been addressed to Congressman William Whitehurst of Virginia who subsequent to receiving the letter contacted the Secretary of the Navy. A Captain Jerry Palmer contacted Banks and informed him that his letter had "created a hornet's nest and the Secretary of the Navy is pissed." (Testimony of Banks, Defendant's Exh. I).

Copies of the letters were received by Rear Admiral Rinard and Vice Admiral Kempf ("Kempf"). (Testimony of Rinard, Testimony of Kempf).

Rinard determined that Banks had violated Navy regulations by sending his letter to the congressmen and ignored the advice that he had given him in late December, 1983 or early January, 1984 to not send the letters in his official capacity. (Testimony of Rinard; Defendant's Exh's. M, 0).

Rinard had the authority to direct the reassignment of an officer in a command billet. (Stip. of Fact ¶ 3, Testimony of Rinard). On January 24, 1984 Rinard called Banks and advised him that because of the letter writing he was transferred to a voluntary (non-paying) training unit in Alameda, California. Rinard felt that the letters had created a controversy but it did not warrant relieving Banks of command. (Testimony of Banks, Plaintiff's Exh. 4, Defendant's Exh. A at 6).

Rinard's decision to reassign Banks from Squadron Commander of VFA-303 to a voluntary training unit was an administrative decision and not punitive action. Rinard was disappointed with Banks because he had acted contrary to his instructions and felt that Banks would not follow other orders. (Testimony of Rinard, Defendant's Exh. 0).

Prior to reassigning Banks, Rinard discussed his proposed action with Admiral Kempf. Admiral Kempf did not direct the action that Rinard should take but discussed the proposed reassignment with Secretary Lehman. Lehman had no objection to the proposed action. (Testimony of Rinard, Lehman Dep. at 32- 34).

In March, 1984 Rinard initiated and executed an adverse fitness report on Banks. He stated in the comment section that he was transferring Banks due to his violation of Article 1149 of the Navy Regulations. Rinard assigned Banks low grades in judgment, organizational support, and desirability for command. (Defendant's Exh. M, Testimony of Rinard).

Secretary Lehman did not direct the preparation of the fitness report on Banks. (Testimony of Lehman, Lehman Dep. at 31-32, Testimony of Rinard).

Secretary Lehman did not give his approval to Banks' letter. (Lehman Dep. at 47).

On January 10, 1986 the adverse fitness report was removed from plaintiff's records. (Defendant's Exh. Z). The Naval Investigative Service has conducted an investigation of the entire letter writing incident. (Plaintiff's Exh. 18).

II.

This case presents itself as a Motion to Dismiss Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.[4]

Rule 41(b) expressly authorizes a motion for dismissal by a defendant after the plaintiff has completed the presentation of his evidence on the grounds that upon the facts and the law, the plaintiff has shown no right to relief. Rule 41(b) states in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant,

without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine

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[4]. The defendant made his motion at the conclusion of the plaintiff's case. However, it should be noted that by stipulation of counsel as to order of proof, the plaintiff testified first, the defendant put on two of his witnesses, the plaintiff rested and then the defendant's motion was made.

them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence.

In deciding a motion for involuntary dismissal under Rule 41(b), the court is free to weigh the evidence and pass on the credibility of witnesses, which it may not do when deciding whether or not to grant a motion for a directed verdict in a jury case. Rule 41(b) requires a court rendering judgment on the merits against the plaintiff to make findings as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

The Fourth Circuit has held that Rule 41(b):

> requires the judge, as the trier of fact, to weigh and consider all of the evidence, and he may sustain the motion even though the plaintiff may have presented a prima facie case.

Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986).

The court's review of this case is governed by the arbitrary and capricious standard. Under this standard in order to uphold the Secretary's action, the court must find that his action was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law". See 5 U.S.C. § 706(2)(A) (1977). The Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 824 (1971), clarified the court's review of agency decisions stating:

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The

> court is not empowered to substitute its Judgment for that of the agency.

The D.C. Circuit in Trans-Pacific Freight v. Federal Maritime Com'n, 650 F.2d 1235, 1251, (D.C. Cir. 1980), cert. denied, 451 U.S. 984, 101 S. Ct. 2316 (1981), provided additional guidance in reviewing agency decisions stating that the reviewing court, after satisfying itself that the agency acted within its statutory authority and that the action was accompanied by appropriate procedural safeguards and sufficient evidence, "must inquire whether the rationale of the agency is both discernable and defensible."

III.

With these principles in mind, the court turns to a discussion of the subject regulations.

Article 1149 of the United States Navy Regulations (1973) is as follows:

1149. Communications to the Congress.

> No person in the naval service shall, in his official capacity, apply to the Congress or to either house thereof, or to any committee thereof, for legislation or for appropriations or for Congressional action of any kind except with the consent and knowledge of the Secretary of the Navy. Nor shall any such person, in his official capacity, respond to any request for information from Congress, or from either house thereof, or from any committee of Congress,

> except through, or as authorized by, the Secretary of the Navy, or as provided by law.

Article 1148 of the United States Navy Regulations (1973) which is titled "1148. Dealings With Members of Congress" is exactly the same as 10 U.S.C. § 1034 (1983) both of which state:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

The plaintiff, Banks, maintains that Article 1149 does not apply to him as a Naval Reservist, and therefore his removal as commanding officer of VFA-303, was arbitrary, capricious, whimsical and without legal justification. Banks contends that Article 1149 is unconstitutionally over-broad as it does not apply to Naval Reservists, and that it violates his First Amendment rights under the United States Constitution.

The Secretary insists that the plaintiff was a person within the department of the Navy, and a person within the meaning of Article 1149. Accordingly, the Secretary contends that Banks was required to follow Navy Regulations, that he was responsible for his acts in communicating with Congress, and in so doing violated Article 1149. The Secretary further contends that Article 1149 does not conflict with the First Amendment.

According to Secretary Lehman the rational of Article 1149 is that it is necessary for national security because "there must be an orderly process for policy, debate and disagreement within the executive branch". However, once a decision is made then the official voice as opposed to the private voice should be

the one dealing with the Congress. Secretary Lehman is of the opinion that a communication on official stationery without authorization violates good order and discipline in the Navy. (Dep. of Lehman at 48-49, Testimony of Rinard).[5]

The Regulation also effectuates the military's position of neutrality in politics which reflects "a 200-year tradition of keeping the military separate from political affairs, a tradition that . . . is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution." Greer v. Spock, 424 U.S. 828, 841, 96 S. Ct. 1211, 1219 (1976) (BURGER, C.J., concurring). Article 1149 serves the national security by contributing to the effectiveness of civilian control over the military.

Commander Banks had several alternatives open to him in order to express his views. Banks could have sent a letter through the chain of command and/or he could communicate in a private capacity with members of Congress without the use of official Navy stationery.

In the case at bar, Banks used official Navy letterhead, wrote his letter as the Commander of VFA-303, and signed the letter in his official capacity as Commander. It is quite clear that if Congressmen were to receive such letters from various

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[5]. There is one credibility call that the court must make in this case, although the court does not feel it is critical to the decision. Admiral Rinard testified that in December, 1983 or early January, 1984 he advised Banks against writing a letter to members of Congress in his official capacity. Commander Banks denies that any such advice was given to him. On the credibility call, the court finds Rinard to be more credible on this issue than commander Banks.

military personnel it would be confusing as to the Navy's official policy.

As to the First Amendment concerns raised by the plaintiff, the court is aware that the First Amendment's guarantee of free speech is "not absolute, and that regulation as to time, place and manner of exercise is proper when reasonably related to a valid public interest." Kannisto v. City and County of San Francisco, 541 F.2d 841, 842 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977) (citing Cox v. Louisiana, 379 U.S. 536, 558, 85 S. Ct. 453, 466 (1965)). See also Breard v. Alexandra, 341 U.S. 622, 642, 71 S. Ct. 920, 932 (1951).

In Pickering v. Bd. of Education, 391 U.S. 563, 8S S. Ct. 1731 (1968), the Supreme Court established a balancing of interests test to determine whether the actions of a governmental employer violate the First Amendment. The Court stated that:

> [t]he problem in any case is to arrive at a balance between the interests of the . . . [employee], as a citizen, in commenting upon matters of public concern and the interest of the . . . [government], as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568, 88 S. Ct. at 1734. The Supreme Court in Connick v. Meyers, 461 U.S. 138, 103 S. Ct. 1684 (1983) has recognized the difficulty in balancing the public employee's and the government employer's interests. This court also is aware of the opposing interest problem raised by cases such as Commander Banks'.

In distinguishing governmental employers from private employers several cases have held that police forces are para-

military units, and as such, the departments' interest in maintaining discipline, esprit de corps and uniformity are to be given great weight. See Kannisto, 541 F.2d at 843, Jurgensen v. Fairfax County, Va., 745 F.2d 868 (4th Cir. 1984). The court recognizes that the several branches of the military naturally maintain these same interests.

The Supreme Court in Goldman v. Weinberger, 475 U.S. 503, 106 S.Ct. 1310 (1986), was faced with an Orthodox Jew and ordained rabbi Air Force officer who was ordered not to wear a yarmulke while on duty and in uniform pursuant to an Air Force regulation. The officer argued that the Air Force regulation infringed on his First Amendment freedom to exercise his religious beliefs. In upholding the regulation, the Supreme Court stated:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, e.g., Chappell v. Wallace, supra, 462 U.S. at 300, 103 S. Ct., at 2365; Greer v. Spock, 424 U.S. 828, 843-844, 96 S. Ct. 1211, 1220, 47 L.Ed.2d 505 (1976) (POWELL, J., concurring); Parker v. Levy, supra, 417 U.S., at 744, 94S. Ct., at 2556. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." Orloff v.

> Willoughby, supra, 345 U.S., at 92, 73 S. Ct., at 539.

Id. at 507, 106 S. Ct. at 1313.

The Court in Goldman went on to point out that:

> Not only are courts "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," Chappell v. Wallace, supra, 462 U.S., at 305, 103 S. Ct., at 2368, quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S. 57, 70, 101 S. Ct. 2646, 2655, 69 L.Ed.2d 478 (1981).

In Goldman the Jewish Air Force officer was faced with the choice of not wearing a yarmulke and complying with Air Force regulations or wearing the yarmulke and being in violation. Unlike the case in Goldman Banks had other avenues open to him to exercise his First Amendment rights. He could have written a letter as a private citizen or circulated a letter through the Navy chain of command.

Banks by writing letters on official Navy letterhead and in his official capacity violated Article 1149 of Navy regulations. Obviously, writing to congressmen about the type of aircraft that

will be used by reserve units is a matter of public concern. However, balanced against that is the military's interest in uniformity, esprit de corps and discipline. Banks had other avenues open to him to exercise his First Amendment rights which he did not utilize. The court feels that the military's interest in uniformity, esprit de corps and efficiency of the Navy outweigh the plaintiff's exercise of his First Amendment rights in this case. The court finds Article 1149 to be a proper regulation as to time, place and manner and reasonably related to valid public interests. Accordingly, the court holds that the regulations are valid and not a violation of the First Amendment.

IV.

Conclusions of Law

This case involves an actual controversy as to whether the plaintiff's rights as a Naval Reservist, which are protected by 10 U.S.C. § 1034 and the First Amendment, were violated by Article 1149 of Navy Regulations. The court has jurisdiction pursuant to 28 U.S.C. § 2201 and 2202.

The court finds that the plaintiff was a person within the department of the Navy, and a person within the meaning of Article 1149. The court further finds that Commander Banks was required to follow Navy Regulations, that he was responsible for his acts in communicating with Congress, and in so doing violated Article 1149 by communicating in his official capacity.

Plaintiff's transfer was an administrative decision and not a punitive one. It was in accordance with applicable Navy Regulations dealing with Naval officers.

Article 1149 is a proper regulation as to time, place and manner, reasonably related to valid public interests and does not conflict with 10 U.S.C. 1034 or the First Amendment.

The action of the Secretary of the Navy was not arbitrary, capricious, an abuse of discretion, or contrary to law.

The defendant's Motion to Dismiss should be granted. An appropriate Order shall issue.

Dated: February 1, 1989
Alexandria, Virginia

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD A. BANKS,	)	Civil Action No. 86-0923-A
Plaintiff,	)	
v.	)	Received March 7, 1989
WILLIAM L. BALL, III, Secretary of the Navy,	)	
Defendant.	)	

ORDER

Upon consideration of Plaintiff's Motions for a New Trial, Amendment of the Findings of Fact and Conclusions of Law, and Amendments to the Complaint, and Defendant Secretary of the Navy's Opposition thereto, and it appearing to the court there is no basis to grant plaintiff a new trial, or to amend the findings of fact and conclusions of law, and that the Motion to Amend the Complaint is untimely, it is accordingly ORDERED:

(1) that the plaintiff's Motion for a New Trial, Amendment of the Findings of Fact and Conclusions of Law, and Amendments to the Complaint be, and the same hereby are, DENIED.

(2) that the Clerk shall forward copies of this Order to all counsel of record.

March 2, 1989
Alexandria, Virginia

_____
United States District Judge

APPENDIX B

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(1) That the plaintiff's Motion for a New Trial, Amendment of the Findings of Fact and Conclusions of Law and Amendments to the Complaint be, and the same hereby are, DENIED.

(2) That the Clerk shall forward copies of this Order to all counsel of record.

March 2, 1959
Alexandria, Virginia

/s/ Albert V. Bryan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1485

RICHARD A BANKS,
Plaintiff-Appellant,

V.

H. LAWRENCE GARRETT, III,
Secretary of the Navy,

Defendant-Appellee.

Roger J. Nichols, of Kadenacy, Mendelson & Schwaber, Los Angeles, California, argued for plaintiff-appellant. With him on the brief was Penrose Lucas Albright, of Arlington, Virginia.

CDR Richard Walsh, Office of the Judge Advocate General, Department of the Navy, argued for defendant-appellee. With him on the brief were Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director, Thomas W. Petersen, Assistant Director, and John S. Groat, of the Civil Division, Department of Justice, Washington, D.C.

Appealed from: U.S. District Court for the Eastern District of Virginia

Judge Cacheris

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1485

RICHARD A BANKS,

Plaintiff-Appellant,

V.

H. LAWRENCE GARRETT, III,
Secretary of the Navy,

Defendant-Appellee.

DECIDED: February 9, 1990
UNPUB. OPIN. ISSUED: February 9, 1990
PUBLISHED OPIN. ISSUED: April 20, 1990

Before NIES, MICHEL, Circuit Judge and BEER, District Judge.* MICHEL, Circuit Judge.

Captain Richard A. Banks (Banks), U.S. Navy Reserve, appeals the judgment of the United States District Court for the Eastern District of Virginia Civil No. 86-0923-A, based on separate orders dismissing Appellant's (1) Little Tucker Act claim (Oct. 27 1988), (2) first amendment claim (Feb. 1, 1989), and (3) Privacy Act claim (July 29, 1988), all the claims in his complaint. Because we hold that Banks' transfer to a nonpay

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* The Honorable Peter Beer, United States District Judge for the Eastern District of Louisiana, sitting by designation.

Navy Reserve position pursuant to a Navy regulation was lawful, his underlying claim for back pay due the incumbent of his former position fails, and therefore we affirm.

BACKGROUND

Banks was appointed Commander of the Naval Reserve VFA-303 squadron in July of 1983. His squadron was designated the first Naval Reserve Aviation Squadron to receive the new F/A-18 Hornet aircraft. Banks v. Garrett, Civil No. 86-0923-A, slip op. at 2 (E. D. Va. Feb. 1, 1989). By December of 1983 Banks heard rumors that the scheduled delivery of the Hornet was to be canceled. Id. at 3. That month he wrote an official letter to the Secretary of the Navy, via his chain of command, expressing his concerns. Id. at 3-4. He also discussed the matter with the Commander of the Naval Reserve Forces, Rear Admiral T.F. Rinard (Rinard), who confirmed there were uncertainties as to when the VFA-303 would be receiving the Hornets. Banks discussed with Rinard the idea of Banks writing to members of Congress. Rinard informed Banks that he could either write as a private citizen or use a procedure whereby he could write in his official capacity but only with prior approval of the Secretary of the Navy. Rinard specifically counseled him against writing in his official capacity. Id. at 4.

The district court found: Banks drafted a letter dated January 6, 1984, to members of Congress. Military personnel of the VFA-303 squadron prepared copies of the letter for members of the House of Representatives and Senate Armed Services committees. Banks authorized a subordinate officer in the squadron to sign Banks' name to the letters and to mail them. Id. The letters were on official Navy letterhead and stated, in part: "As the Commanding Officer of Strike Fighter Squadron THREE ZERO THREE I would like to draw your

attention to the possibility that the current planned transition of this command to the F/A-18 aircraft is in jeopardy." Id. at 5. In the letter Banks included his home and office phone numbers and signed the letter as "R.A. Banks, Commanding Officer." Id. He also volunteered to visit members of Congress in Washington if needed. Id.

Congressman William Whitehurst of Virginia received one of the letters and notified the Secretary of the Navy. Rinard learned of the letter writing, saw a copy of the text, and determined the letter violated Article 1149 of the Navy Regulations. Id. Article 1149 bars "any person in the naval service" from communicating to Congress in his official capacity without the consent of the Secretary of the Navy. Navy Regs., art. 1149 (1973).

In March of 1984, Rinard initiated an adverse fitness report on Banks. He also issued orders transferring Banks to a voluntary training unit in Alameda, California, due to violation of Article 1149. Id. at 6. In January of 1986 the adverse fitness report was removed from Banks' records, id. at 7, but Banks remained in the voluntary training unit that was a nonpaying billet.

On January 22, 1986, Banks brought suit in district court challenging his reassignment. Proceedings were stayed, however, while Banks sought relief from the Board for Correction of Naval Records. The Board denied Banks relief and he then pursued his remedy in the district court. The government filed a motion to dismiss the complaint and the court heard argument on the motion. On July 29, 1988, the court ordered dismissal of Banks' Privacy Act claim. Three months later the government renewed its motion to dismiss and on October 27, 1988, the court ordered dismissal of Banks' Little Tucker Act claim. The first amendment claim was tried on

December 21, 1988. In-court testimony was given by Banks and Rinard and deposition testimony by the former Secretary of the Navy (Lehman) was offered into evidence. On February 1, 1989, the district court ordered the dismissal of the first amendment claim. Judgment was entered and this appeal followed.

ISSUE

Whether Banks' violation of Navy Regulation 1149 supports transfer to a nonpay position without offending the first amendment.

OPINION

Appellant asserts this court has jurisdiction under 28 U.S.C. §1295(a) (2) (1982). We do have exclusive jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on [28 U. S. C.] section 1346 [with exceptions not pertinent here, e.g., a tax claim]." Id. Section 1346(a) (2), part of what is commonly known as the Little Tucker Act, provides "district courts shall have original jurisdiction . . . of [any nontort] civil action or claim against the United States, not exceeding $10,000 . . . ." Appellant asserted a nontort claim against the United States not exceeding $10,000 and therefore the District Court for the Eastern District of Virginia had original subject matter jurisdiction. Consequently, we have jurisdiction under 28 U.S.C. § 1295(a) (2) to hear this appeal.

I. The Little Tucker Act Claim

Banks has stated a claim under the Little Tucker Act sufficient to avoid dismissal only if he has demonstrated a substantive right, independent of the Act, to payment of money

by the United States because the Act itself does not create a cause of action but merely waives sovereign immunity (and grants jurisdiction to the district courts or the Claims Court, depending on the amount of damages). See United States v. Testan, 424 U.S. 392, 398 (1976).

Appellant claims he is due back pay under 37 U.S.C. § 204(a) and 206(a) (1982). Neither section, however, establishes his right to payment. Section 204(a)(1) provides for payment to "a member of a uniformed service who is on active duty." Regulations define "active duty" as "[f]ull-time duty in a U.S. Military Service." 32 C.F.R. § 102.3 (1989). Banks was not on full-time duty following his transfer, the only time period at issue in this appeal. Section 204(a)(2) provides for payment to "a member of a uniformed service [not a Reserve of the Army or Air Force] who is participating in full-time training . . . or other full-time duty . . . ." Banks did not so participate and therefore is not entitled to payment under this subsection either. Cf. Ayala v. United States, 16 Cl. Ct. 1, 4 (1988) ("[A] reservist is not entitled to compensation . . . unless he is ordered to perform and actually performs the work. Compensation is not based on status as a reservist." (citing United States v. Wickersham, 201 U.S. 390 (1906))).

Nor does the remaining statutory provision Banks relies upon require the payment of money to Banks. Section 206(a) provides:

Under regulations prescribed by the Secretary. . . a member of a reserve component of a uniformed service who is not entitled to basic pay under section 204 of this title, is entitled to compensation . . . for each regular period of instruction, or period of

> appropriate duty, at which he is engaged for at least two hours....

This provision allows for payments to reservists for inactive duty training, as prescribed by regulation. Banks, however, was transferred to a "voluntary training unit." Banks, slip op. at 6. Defense Department regulations provide that a voluntary training unit is one "formed by volunteers to provide [Reserve Component] training in a nonpay status for [Individual Ready Reserve] and active status Standby Reservists. . . participating in such units for retirement points." 32 C.F.R. § 102.3 (1989) (emphasis added). After Banks was transferred to the Voluntary Training Unit he performed no reserve unit drills for pay, by application of this regulation. Thus he was not entitled to payment following his transfer.

Upon analysis, Appellant has not demonstrated a substantive right to payment by the United States separate from 28 U. S. C. § 1346(a) (2); therefore, the district court properly dismissed his Little Tucker Act claim. Although the court stated the dismissal was"for lack of jurisdiction" we think it clear that the district court concluded Banks failed to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12 (b) (6). Thus, the court' s dismissal was effectively an adjudication on the merits.

II. The First Amendment and Privacy Act Claims

Appellant also alleged violations of his first amendment[1] and Privacy Act rights that, he asserted, entitle him to reinstatement to his former, paying position. The district court dismissed these claims as well, in orders dated, respectively, February 1, 1989, and July 29, 1988. Our review of Appellant's first amendment and Privacy Act claims is required under Hohri v. United States, 482 U.S. 64 (1987), in which the Supreme Court stated that a "mixed case presenting both a nontax Little Tucker Act claim and [a claim not within the Federal Circuit's exclusive jurisdiction], may be appealed only to the Federal Circuit." Id. at 75-76. Clearly, that means that our court is also to decide the non-Tucker Act claims in "mixed" cases. Accordingly, when a mixed case is presented and the nontax Little Tucker Act claim is dismissed, the other claims may be reviewed provided the Little Tucker Act claim was

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[1] In 1988 Congress amended 10 U.S. C. § 1034, providing, in part:
"No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General [provided the communication is not unlawful]." It prohibits the taking of retaliatory personnel action for such communication. The statute is not retroactive; it only applies to personnel action on or after the date of enactment, September 29, 1988. Thus the new provision is not applicable to this appeal, and we intimate no disposition whether Article 1149 is invalid under section 1034, as amended. That issue is for another day.

nonfrivolous.[2] See Ralston Steel Corp. v. United States, 340 F.2d 663, 667 (Ct. Cl.), cert. denied, 381 U.S. 950 (1965) (Jurisdiction is appropriate if a claim "is not frivolous but arguable."). Banks' Little Tucker Act claim was nonfrivolous. Although not generally subject to judicial review, military transfers that violate the first amendment are reviewable by this court. See Woodward v. United States, 871 F.2d 1068, 1072 (Fed. Cir. 1989) ("[E]mployment actions claimed to be based on constitutionally infirm grounds are . . . subject to judicial review."); See also Brown v. Glines, 444 U.S. 348, 351-53 (1980) (Removal of Air Force Captain raised first amendment claim subject to review).

To prevail on appeal from dismissal of both his first amendment and Privacy Act claims, Appellant must show his first amendment rights have been violated. To do so, he could demonstrate, from the record evidence, that he did not violate

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[2] This court has previously been presented with similar appeals involving mixed claims. In one, we dismissed all of the claims for lack of jurisdiction. See Guercio v. Brody, 884 F.2d 1372, 1374 (Fed. Cir. 1989) ("[T]he district court did not have jurisdiction over a claim satisfying, the requirements of the Little Tucker Act, and for that reason we are without jurisdiction to hear this appeal.") In Guercio, we must presume, the Little Tucker Act claim was seen as frivolous, thus making dismissal for lack of jurisdiction proper. Here, by contrast, neither the district court nor this court viewed the Little Tucker Act claim as frivolous. Banks cited statutes that at least appeared to mandate payment of money to reservists performing drills. Thus, this case compares, not with Guercio, but with Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988) (on remand), where our court took jurisdiction and found the Little Tucker Act claim dismissible but, inferentially, nonfrivolous.

Article 1149 of the Navy Regulations which states: "No person in the naval service shall, in his official capacity, apply to the Congress or to either house thereof, or to any committee thereof, for. . . Congressional action of any kind except with the consent and knowledge of the Secretary of the Navy." Navy Regs., art. 1149 (1973). Thus, Banks would need to show either he acted not in his official capacity but as a private citizen, or he was not a "person in the naval service."

That Captain Banks did act in his official capacity, however, is patently clear. The trial court found that Appellant "used official Navy letterhead, wrote his letter as the Commander [of the squadron], and signed the letter in his official capacity as Commander." Id. at 11; See Joint App. 121-22, Banks v. Garrett, No. 89-1485 (Fed. Cir. filed Jan. 4, 1990) (letter). It therefore found he acted in his official capacity. Banks, slip op. at 15. We cannot disagree. Certainly, such a finding is not clearly erroneous. As to Appellant not being a "person in the naval service," Banks has shown no authority for construing that phrase so as to exclude reserve officers in reserve units.

Because Banks did act in his official Navy capacity, he must demonstrate that the Regulation is unconstitutional by establishing that his action was protected by the first amendment and that his first amendment speech interests outweigh the government's countervailing interests in uniformity, esprit de corps, and discipline. See Connick v. Myers, 461 U.S. 138, 142 (1983). Banks, however, makes little showing as to his particular interests under the circumstances of this case. Therefore, Banks effectively asks us to hold Article 1149 itself unconstitutional as violative of the first amendment. This we decline to do as the provision clearly passes constitutional muster.

As the Supreme Court stated,"[R]eview of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations [because] to accomplish its mission the military must foster instinctive obedience, unity, commitment, and sprit de corps." Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

Article 1149 restricts communicating with Congress in an official capacity, absent the consent of the Secretary of the Navy.[3] The government's interest in naval esprit de corps and discipline, as well as a uniform voice for the Department of the Navy, is an interest important to national security that outweighs Banks' private interest in communicating, directly and without approval, with Congress in his official capacity. Cf. Connick, 461 U.S. at 142; Mings v. Department of Justice, 813 F.2d 384, 389 (Fed. Cir. 1987).

Moreover, Banks has an adequate alternative avenue to communicate with Congress. A corollary provision, Article 1148, read in conjunction with Article 1149, unconditionally permits an officer to write Congress in his private capacity. It provides:. "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." Navy Regs., art. 1148 (1973). Article 1149 is "a regulation necessary to the security of the United States."

We therefore conclude the trial court properly balanced the first amendment interest of Banks, as a public employee, against the government employer's interest, and correctly held

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[3] That Banks wrote without the Secretary's consent is undisputed.

that the Naval regulations "are valid and not a violation of the First Amendment." Banks, slip op. at 15. Thus, the first amendment claim and the wholly derivative Privacy Act claim were properly dismissed.[4] See Boyd v. Secretary of Navy, 709 F.2d 684, 687 (11th Cir. 1983), cert. denied, 464 U.S. 1043 (1984) (The Privacy Act, 5 U.S.C. § 552a(e)(7), is not violated unless a document "implicate[s] an individual's first amendment rights.").

We have also considered Appellant's additional arguments relating to the first amendment and Privacy Act claims and determine that they neither have merit nor merit discussion. Therefore, the judgment of the district court is

AFFIRMED.

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[4] Banks argues that the Navy, because of its investigation of his violation of Article 1149 and related matters, kept a file on him that violates the Privacy Act.

APPENDIX C

INDEX TO APPENDIX C

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

REGULATIONS

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Constitutional Provisions Involved -- Amendment I to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statutory Provisions Involved:

1. 5 United States Code Section 552 provides:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, and agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes

such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that --

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section --

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II)or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Repealed

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably

incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request–

(i) the need to search for and collect the requested records from field facilities or

other establishments that are separate form the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or amount two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained form a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law

enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and , in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and–

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information form congress.

(e) On or before March 1 or each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include–

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees and penalties assesses under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(As amended Pub.L. 95-454, Title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub.L. 99-570, Title I §§ 1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49.)

2. 5 United States Code Section 2105 provides:

§ 2105. Employee

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is–

(1) appointed in the civil service by one of the following acting in an official capacity–

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

(b) An individual employed at the United States Naval Academy in the midshipmen's laundry, the midshipmen's tailor shop, the midshipmen's cobbler and barber shops, and the midshipmen's store, except an individual employed by the Academy dairy, is deemed an employee.

(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of--

(1) laws (other than subchapter IV of chapter 53 of this title, subchapter III of chapter 83 of this title to the extent provided in section 8332(b)(16) of this title, and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

(2) subchapter I of chapter 81, chapter 84, and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

(d) A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

(e) Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title.
Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 409; Pub.L. 90-486, § 4, Aug. 13,1968, 82 ????t. 757; Pub.L. 91-375, § 6(c)(4), Aug. 12,1970, 84 Stat. 775; Pub.L. 92-392, § 2, Aug. 19, 1972, 86 Stat. 573.

3. 10 United States Code Section 1034 in 1984 provided:

§ 1034. Communicating with a member of Congress

No person may restrict any member of an armed force in communicating with a member of congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.
(Aug. 10, 1956, c. 1041, 70A Stat. 80.)

4. 10 United States Code 1034, as amended in 1988 provides:

(a) Restricting communications with Members of Congress and Inspector General prohibited--(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of retaliatory personnel actions.-- No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a Member

of Congress or an Inspector General that (under subsection (a)) may not be restricted. Any actin prohibited by the preceding sentence (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General investigation of certain allegations.– (1) If a member of the armed forces submits to the Inspector General of the Department of Defense (or the Inspector General of the Department of Transportation, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall expeditiously investigate the allegation.

(2) A communication described in this paragraph is a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted in which the member of the armed forces makes a complaint or discloses information that the member reasonably believes constitutes evidence of–

(A) a violation of a law or regulation; or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3) The Inspector General is not required to make an investigation under paragraph (1) in the case of an allegation made more than 60 days after the date on which the member

becomes aware of the personnel action that is the subject of the allocation.

(4) If the Inspector General has not already done so, the Inspector General shall commence a separate investigation of the information that the member believes evidences wrongdoing as described in subparagraph (A) or (B) of paragraph (2). The Inspector General is not required to make such an investigation if the information that the member believes evidences wrongdoing relates to actions which took place during combat.

(5) Not later than 30 days after completion of an investigation under this subsection, the Inspector General shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and the member of the armed forces concerned. In the copy of the report submitted to the member, the Inspector General may exclude any information that would not otherwise be available to the member under section 552 of title 5.

(6) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (5) within 90 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice--

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(7) The report on the results of the investigations shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(d) Correction of records when prohibited action taken. -- (1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

(2) In resolving an application described in paragraph (1), a correction board --

(A) shall review the report of the Inspector General submitted under subsection (c)(5);

(B) may request the Inspector General to gather further evidence; and

(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.

(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1) --

(A) may be provided with representation by a judge advocate if –

(i) the inspector General, in the report under subsection (c)(5), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against he member with respect to a communication described in subsection (c)(2;

(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

(iii) the member is not represented by outside counsel chosen by the member; and

(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (c)(5).

(4) The secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and

1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

(e) Review by Secretary of Defense.--Upon the completion of all administrative review under subsection (d), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

(f) Post-disposition interviews.-- After disposition of any case under this section, the Inspector General shall, whenever possible, conduct an interview with the person making the allegation to determine the views of that person on the disposition of the matter.

(g) Regulations.--The Secretary of Defense, and the Secretary of Transportation with respect to the coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.

(h) Definitions.--In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978; and

(B) an officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces.

(3) The Inspector General is not required to make an investigation under paragraph (1) in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

(4) If the Inspector General has not already done so, the Inspector General shall commence a separate investigation of the information that the member believes evidences wrongdoing as described in subparagraph (A) or (B) of paragraph (2). The Inspector General is not required to make such an investigation if the information that the member believes evidences wrongdoing relates to actions which took place during combat.

(5) Not later than 30 days after completion of an investigation under this subsection, the Inspector General shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast guard when the Coast Guard is not operating as a service in the Navy) and the member of the armed forces concerned. In the copy of the report submitted to the member, the Inspector General may exclude any information that would not otherwise be available to the member under section 552 of title 5.

(6) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (5) within 90 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast guard is not operating as a service in the Navy) and to the member making the allegation a notice--

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(7) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(d) Correction of records when prohibited action taken.--(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

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(C) may receive oral argument, examine and cross-examine witness, take depositions, and, if appropriate, conduct an evidentiary hearing.

(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1)–

(A) may be provided with representation by a judge advocate if–

(i) the Inspector General, in the report under subsection (c)(5), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);

(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

(iii) the member is not represented by outside counsel chosen by the member; and

(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigation.

(As amended Oct. 19, 1984, Pub.L. 98-525, Title XIV, § 1405(19)(A), (B)(i), 98 Stat. 2622; Sept. 29, 1988, Pub.L. 100-456, Div. A, Title VIII, § 846(a)(1), 102 Stat. 2027; Dec. 12, 1989, Pub.L. 101-225, Title II, § 202, 103 Stat. 1910.)

Regulations

1. Navy Regulation Section 1148 provides

1148. Dealing with members of Congress.

No person may restrict any member of an armed force in communicating with a Member of congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

2. Navy Regulation Section 1149 provides:

1149. Communications to the congress.

No person in the naval service shall, in his official capacity, apply to the Congress or to either house thereof, or to any committee thereof, for legislation or for appropriations or for Congressional action of any kind except with the consent and knowledge of the Secretary of the Navy. Nor shall any such person, in his official capacity, respond to any request for information form congress, or from whither house thereof, or from any committee of Congress, except through, or as authorized by, the Secretary of the Navy, or as provided by law.

No. 89-1966 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD A. BANKS, PETITIONER

v.

H. LAWRENCE GARRETT, III,
SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Navy violated the First Amendment, the Privacy Act, or other federal law by transferring petitioner, a reserve Naval officer, to a non-pay status based upon petitioner's unauthorized communication to members of Congress made in petitioner's official capacity and concerning Navy affairs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 901 F.2d 1485. The opinion of the district court (Pet. App. A9-A24) is reported at 705 F. Supp. 282.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990, and a petition for rehearing was denied on March 12, 1990. The petition for a writ of certiorari was filed on June 11, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Captain in the United States Naval Reserve, was the commanding officer of Naval Reserve Squadron VFA-303 when he wrote a letter to various members of Congress expressing his concern over the Navy's failure to supply certain aircraft to his squadron and requesting congressional action. He wrote the letter on official Navy letterhead, over his signature as commanding officer, and expressly stated that he was writing as the commanding officer of VFA-303. The Secretary of the Navy neither authorized nor consented to the transmission of this letter. Pet. App. A10-A13, B11 n.3.

Petitioner's superior, Rear Admiral T. F. Rinard, Commander of the Naval Reserve Forces, had previously advised petitioner that a service member could correspond with members of Congress either as a private citizen or through the Navy chain of command, but Rinard counseled petitioner against writing directly to Congress in his official capacity. Pet. App. A12. Upon learning that petitioner had ignored this advice, Rinard determined that petitioner had violated Article 1149 of United States Navy Regulations (1973), which provides, in pertinent part:

> No person in the naval service shall, in his official capacity, apply to the Congress or to either house thereof, or to any committee thereof, for legislation or for appropriations or for Congressional action of any kind except with the consent and knowledge of the Secretary of the Navy.

Rinard reassigned petitioner from his position as Squadron Commander of VRA-303 to a voluntary, non-paying position with a Naval Reserve training unit. Thereafter, petitioner brought suit in district court, alleging that his reassignment violated the First Amendment and the

Privacy Act, 4 U.S.C. 552a(e)(7). He also asserted a claim for back pay. Pet. App. A9-A10, A12-A15.

The district court first dismissed petitioner's Privacy Act claim (Pet. App. A1) and his claim for back pay (*id.* at A6). The court then conducted a trial and dismissed petitioner's First Amendment claim. *Id.* at A7-A8, A9-A24, B4-B5. The district court determined that petitioner had violated Article 1149 because he wrote the letters without authorization on official Navy letterhead in his official capacity as commanding officer of the squadron. Pet. App. A22. Applying this Court's decision in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), the court held that Article 1149 is "a proper regulation as to time, place and manner and reasonably related to valid public interests" (Pet. App. A23) and that the "military's interest in uniformity, esprit de corps and efficiency of the Navy outweighs [petitioner's] exercise of his First Amendment rights in this case." *Ibid.* The court therefore dismissed petitioner's action with prejudice. *Id.* at A7-A8.

2. The court of appeals affirmed the district court's decision. Pet. App. B1-B12. With respect to the back pay claim, the court of appeals first found that none of the statutory provisions that petitioner cited in support of that claim created any entitlement to pay following his transfer and that petitioner, accordingly, had failed to state a claim on which relief could be granted. *Id.* at B6-B7. The court then rejected petitioner's First Amendment and Privacy Act claims, holding that under this Court's decision in *Goldman*, the Navy could permissibly restrict communications between service members, acting in their official capacity, and Congress. *Id.* at B8-B12.

ARGUMENT

This Court stated in *Goldman* v. *Weinberger*, *supra*, that "review of military regulations challenged on First

Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." 475 U.S. at 507. The Court explained:

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

Ibid. (citations omitted). The Navy's regulation, which restricts communication between Congress and service members purporting to act in their official capacity, is plainly designed to foster military "obedience, unity, commitment, and esprit de corps" and to assure that communications between the Executive and Legislative Branches are conducted through appropriate channels. Furthermore, the regulation, which places no restriction on a service member's communications with Congress as a *private citizen*, "restrict[s] speech no more than is reasonably necessary to protect the substantial governmental interest." *Brown* v. *Glines*, 444 U.S. 348, 355 (1980). The lower courts correctly held that the Navy's limitation on a service member's communications with Congress does not violate the service member's First Amendment rights.

1. Petitioner appears to concede that the Navy may restrict communications between regular active duty naval personnel and Congress. He argues, instead, that his communication with Congress is entitled to First Amendment protection because he is a naval reservist rather than a member of the "regular naval personnel." Pet. 7-11. Petitioner advances no authority—and we know of none—for

this novel proposition. This Court's decision in *Goldman* extends special deference to "military regulations" as compared to "regulations designed for civilian society." 475 U.S. at 507. Neither *Goldman* nor the relevant Navy regulation, which, by its terms, applies to "any person in the naval service" (Pet. App. B4), draws a distinction between reservists and other personnel. Indeed, the line petitioner draws makes no sense. When a military officer purports to act in his official capacity, he directly implicates the military's interests whether he is a reservist or a regular member. Petitioner concedes that there is "no precedent" (Pet. 7) for his position and, hence, no conflict with another court of appeals.

2. Petitioner also contends that he is entitled to special protection as a "whistleblower." Pet. 11-18. Petitioner fails to recognize, however, that the Navy regulation at issue, Article 1149, does not restrict his communications with Congress based on their content, but rather on his representation that he is acting "in his official capacity." Navy regulations, specifically Article 1148, permit communication between members of Congress and service members acting in their private capacity "unless the communication is unlawful or violates a regulation necessary to the security of the United States." See Pet. App. B11.

Petitioner further contends that the Navy's decision to transfer him to a non-pay status violates a recently enacted federal statute that prohibits the military from taking "retaliatory personnel actions" against persons who report evidence of "a violation of a law or regulations" or of "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 10 U.S.C. 1034(b) and (c)(2). Even assuming what we do not concede—that this 1988 law reaches a military officer's unauthorized communications in his official capacity—the law is not applicable to petitioner's transfer,

which occurred in 1984. Congress has expressly stated that the statute shall apply only to "personnel action taken (or threatened to be taken) on or after the date of the enactment of this Act." National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, Tit. VIII, § 846(d), 102 Stat. 2030. See Pet. App. B8 n.1.

3. Petitioner argues that the court of appeals mistakenly described him as a "public employee." Pet. 18-20. That description, however, is beside the point. The relevant question, for purposes of Article 1149, is whether petitioner made an unauthorized communication with Congress in his "official capacity." As the court of appeals explained, it is "patently clear" (Pet. App. B10) that petitioner communicated to Congress in his official capacity. Petitioner wrote to members of Congress on official Navy letterhead, he stated that he was corresponding as "Commanding Officer" of his squadron, and he signed the letter using the title "Commanding Officer." See *id.* at B3-B4, A12-A20. Although petitioner suggests these are "superficial facts" (Pet. 20), they are plainly adequate to support the district court's findings.

4. Petitioner contends that "other important issues such as inconsistent treatment of whistleblowers, due process, Privacy Act rights, and [petitioner's] right to back pay arise from the primary First Amendment question raised in this case." Pet. 23. Petitioner's farrago of fact-bound subsidiary issues plainly does not merit further review. Petitioner does not contend that any of these issues presents a conflict among the courts of appeals, and with the exception of the Privacy Act and back pay claims, he does not advert to any legal principles supporting the request for review. See *id.* at 23-29. As to the Privacy Act claim, petitioner conceded that "[t]his subsidiary issue flows from the primary First Amendment issue" (*id.* at 27). But since petitioner's "primary First Amendment

question" does not present a substantial issue, there is no basis for further review of "the wholly derivative Privacy Act claim." Pet. App. B12. As to the back pay claim, the court of appeals correctly ruled that petitioner, who was lawfully transferred to a non-pay status, failed to demonstrate a substantive right to payment of money from the United States. *Id.* at B5-B7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

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(4)

No. 89-1966

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD A. BANKS,
Petitioner, Plaintiff

v.

H. LAWRENCE GARRETT, III
Secretary of the Navy,
Respondent, Defendant

BRIEF FOR THE PETITIONER IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Federal Circuit

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QUESTION PRESENTED

WHETHER THE MILITARY NECESSITY DOCTRINE IN GOLDMAN V. WEINBERGER, WHICH RESTRICTS THE FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL ON ACTIVE FULL-TIME DUTY, SHOULD BE APPLIED TO A RESERVIST WHEN HE IS NOT IN ANY DUTY STATUS WHATSOEVER.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1966

RICHARD A. BANKS, PETITIONER

v.

H. LAWRENCE GARRETT, III
SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY TO OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 901 F.2d 1485. The opinion of the district court (Pet. App. A9-A24) is reported at 705 F. Supp. 282.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990, and a petition for rehearing was denied on March 12, 1990. The petition for a writ of certiorari was filed on June 11, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

I.

STATEMENT

In his reply Petitioner Richard A. Banks ("Banks") will address only the aspects of this case relevant to the issues raised in the Brief For The Respondent In Opposition.

It is clear from the opposition of the Respondent H. Lawrence Garrett, III, Secretary of the Navy ("the Navy") that the Navy relies totally on three points to determine what constitutes "in naval service" and "official capacity" for the purpose of applying Article 1149 to Banks:

(1) use of official Navy letterhead;
(2) reference to a military service title, and
(3) content relevant to Navy matters.
(Rspdt. 6)

However, at the time Banks wrote the letter in question and caused copies to be sent to Congressmen he had completed his active duty and was not in any duty status either pay or non-pay. He was not eligible for any service related benefits such as medical disability in case he injured himself at that time. See Woods v. Covington County Bank, 537 F. 2d 804, 810-811 (1976); 45 Comp. Gen 405. His status was that of a civilian to the Navy for all purposes except denial of his First Amendment rights under Article 1149 of Navy Regulations.

Further, at the time he wrote the letter he was not subject to any military discipline. He was not subject to the jurisdiction under the Uniform Code of Military Justice ("Code"), (Uniform Code of Military Justice ("UCMJ"), Art. 2, 10 U.S.C. §802, Duncan v. Usher, CMA 1986, 23 MJ 29), the Hatch Act, or any other act which applied to personnel in active duty status. It is evident that if he had been under the jurisdiction of the Code

the Navy would have exercised its authority thereunder. However, Banks, because he was an off-duty reservist, was not subject to court martial or other punitive actions authorized by the Code. This is the true reason the Naval Investigative Service investigation initiated by the Navy fizzled out. (Trial Exhibit 18)

The Navy was undoubtedly well aware it had no UCMJ jurisdiction over Banks. Duncan v. Usher, CMA 1986, 23 MJ 29.

Despite the fact that Banks was not considered in any duty status at the time of writing the letter in issue, the Navy asserts that Article 1149 may be broadly interpreted pursuant to Goldman v. Weinberger, 475, U.S. 503 (1986) to encompass Banks' conduct because of the letterhead and the content of the letter in which he discusses a public Navy matter and because he uses his title.

II.

ARGUMENT

A. IT IS AN IMPORTANT QUESTION FOR THIS COURT TO CONSIDER WHETHER GOLDMAN v. WEINBERGER, WHICH RESTRICTS THE FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL ON FULL-TIME ACTIVE DUTY, SHOULD BE APPLIED TO OFF-DUTY RESERVISTS

The application of Goldman v. Weinberger, supra, to off-duty reservists extends the restrictions of that case to many millions of reservists and retired military personnel and may undermine the basic premise of the reserve system. The

appropriateness of such extension is an important question for review by this Honorable Court.

Petitioner Banks, as stated in the Amicus Curiae Brief In Support of the Granting of Petitioner - Plaintiff's Petition For Writ of Certiorari to the United States Court of Appeals For the Federal Circuit of the Government Accountability ("Amicus Curiae"), presents the question of whether this Honorable Court's decision in Goldman v. Weinberger, supra, should be overturned. However, most importantly, Petitioner Banks in this case presents the critical and far-reaching question whether the Goldman case should be applied to a reservist when he is not in any duty status.

Comparing the facts of Goldman v. Weinberger, supra, with this case, we find Petitioner S. Simcha Goldman in Goldman v. Weinberger, supra, was in active regular service in the United States Air Force at the time he insisted on wearing his yarmulke while on duty on the base in violation of AFR 35-10. Goldman v. Weinberger, supra, at 503. On the other hand Petitioner Banks in this case was a reservist, not in any duty status at the time he wrote his letter. He had completed his reservist term of duty. He was not earning service pay for his time at the time he wrote the letter, although his reservist position was categorized in a pay billet. There is no basis to extend the Goldman v. Weinberger decision to the facts of this case. Respondent cites no authority for its proposition that Goldman v. Weinberger, supra, somehow applies to an off-duty reservist because he uses Navy letterhead and his title and discusses public Navy matters in a communication to Congressmen.

The test for reviewing a military regulation cited in Goldman v. Weinberger, supra, indicates otherwise. The test is "whether 'legitimate military ends are sought to be achieved'

[citations omitted] and whether it is 'designed to accommodate the individual right to an appropriate degree'." Goldman v. Weinberger, supra, at 506. In the case at bar if we apply this test to the application of Article 1149 to Petitioner Banks as an off-duty reservist, his individual right must be accommodated. This is true particularly in light of 5 U.S.C. §2105(d) which states an off-duty reservist is not a public employee, directly contrary to the court of appeals opinion in this case. The individual right in issue here is a civilian's First Amendment right to write to Congressmen. With respect to any legislative or regulatory intrusion on such First Amendment rights, strict construction is required. Elfbrand v. Russell, (1966), 384 U.S. 11, 86 S.Ct. 1238, 16 L. Ed 2d 321; Wolf v. Selective Service Local Bd No. 16 C.A.N.Y., (1967), 37 F. 2d 817. Article 1149 cannot be read loosely and broadly to encompass conduct of an off-duty reservist simply because the Navy may consider the correspondence embarrassing or some sort of threat. The superficial fact of what letterhead was used and Banks' reference to his title to show that he was in a position to know what he was writing about is not controlling. The type of letterhead and use of title are not sufficient to outweigh a civilian's First Amendment right to voice a concern to his legislative representatives. What is controlling is the applicable federal statute, 5 U.S.C. §2105(d) and the Navy's consistent treatment of off-duty reservist personnel as civilians in all other aspects of Navy business.

B. THE CONSTITUTIONALITY OF THE NAVY'S USE OF ARTICLE 1149 AS A CONTENT BASED RESTRICTION ON AN OFF-DUTY RESERVIST'S COMMUNICATION TO CONGRESSMEN IS A QUESTION OF PARAMOUNT IMPORTANCE.

In the opposition brief, the Navy takes great pains to assert Article 1149 does not restrict Banks' letter because of its content but based on the fact he used his title which somehow is "official capacity" within Article 1149. (Rspdt. 5) This is absurd. Of course, it was the content of the letter that aroused the wrath of the Navy. If Banks had written about some other matter such as social security benefits to seniors in his local community on Navy letterhead and used his reservist title, the Navy would not have invoked Article 1149. Article 1149 was invoked because of the discussion of the holdback of FA/18 planes from the reservists in Banks' letter.

Banks was punished as a whistleblower. The content of his letter related to possible government waste and/or misconduct and the Navy objected to his revealing their conduct. The indicia of official capacity relied on by the Navy and the courts below is not supported by any law or regulation. Further, it conflicts with basic First Amendment constitutional principles requiring strict construction of any law or regulation restricting First Amendment rights. This content-based restriction on speech and the fundamental right of a civilian to write to his Congressmen is an issue of paramount importance for this Honorable Court to examine.

C. THE IMPORTANT QUESTION FOR REVIEW IN THIS CASE IS WHETHER THE STRICT SCRUTINY OR BALANCING TESTS ARE MORE APPROPRIATE STANDARDS FOR REVIEW OF THE DENIAL OF FIRST AMENDMENT RIGHTS TO AN OFF-DUTY RESERVIST THAN THE MILITARY NECESSITY DOCTRINE USED BY THE LOWER COURTS.

Amicus Curiae asks that this Honorable Court grant the Petition for Writ of Certiorari because the facts of Petitioner's case present a unique opportunity for a reevaluation and revision of the Goldman v. Weinberger Doctrine. In turn, the Solicitor General has utilized Goldman v. Weinberger, supra, almost entirely to justify the decisions of the lower courts.

Albeit overly simplified, there appears to be currently three theories applied by federal courts to protect the constitutional rights of our citizenry which are uniquely raised in the instant case. These are:

(1) For private citizens, this Honorable Court has required a test on constitutional, particularly First and 14th Amendment, issues of "strict scrutiny";

(2) To protect the constitutional, and particularly First Amendment rights of government employees, the test this Court applies has been labeled the "balancing test."

(3) The constitutional rights of military personnel are subject to a third jurisprudence approach known as the "Military Necessity Doctrine."

A recent comparison of the "strict scrutiny" and the "balancing" tests, is made in the concurring opinion of Justice Stevens and the dissent of Justice Scalia joined by the Chief

Justice, and Justices Kennedy and O'Connor (in part) in Rutan v. Republican Party of Illinois, 497 U.S. ____, 111 LEd2d 52, 70, 78, 81-85, 110 S Ct ____ (1990).

The "Military Necessity" Doctrine as expounded in Orloff v. Willoughby, 345 U.S. 83 (1953) to Goldman v. Weinberger, supra, seems to be an aberration which, thinly disguised if disguised at all in Orloff v. Willoughby, supra, reflects an approach of the political jurisprudence school rather than the legal realism school. Essentially in Orloff v. Willoughby, supra, the Court said to the military that if you keep off of our turf, we'll keep off of yours. It is the rationale of Orloff v. Willoughby, supra, and Goldman v. Weinberger, supra, which created and expounds the "Military Necessity Doctrine." The result in both cases, particularly in Orloff v. Willoughby, supra, may have been the same if the "balancing test" had been applied.

Although the facts in Petitioner Banks' case seem peculiarly appropriate for this Honorable Court to take a new look at the Military Necessity Doctrine, they are distinguishable from Goldman v. Weinberger, supra, in that Banks was not a full-time member of the Armed Services on active duty when he wrote to Congressmen. Indeed, at the specific time in issue, he was not in any duty status whatsoever and in every other respect such as pertains to pay, jurisdiction under the Uniform Code of Military Justice, disability benefits, medical and hospital benefits and, particularly in view of the plain language of 5 U.S.C. §2105(d), he was in a civilian status. But this difference in Petitioner's factual situation serves also to emphasize that the lower courts' decisions in Petitioner's case, which extend the "Military Necessity Doctrine" to all reservists not on active duty, which includes members of the National Guard and the National Air Guard who are not on active duty, and by implication to the military retired community as well, essentially

doubles the number of persons who are subjected to this arbitrary and open-ended doctrine. It is a substantial break from the long standing tradition of the military as codified in 5 U.S.C. §2105(d), which declares off-duty reservists are not public employees.

Further, Article 1149 does not prohibit Banks from using official letterhead in communicating with Congressmen as he did. To find differently, the lower courts had to consider themselves mandated by the Military Necessity Doctrine to construe Article 1149 very broadly and 10 U.S.C. §1034 narrowly. The protection of Banks' First Amendment rights probably should have been based upon the "strict scrutiny test" because he was a civilian when his letters to Congressmen were composed, written and mailed. Even under the balancing test as applied by the dissent in Rutan, the legislative declaration of an off-duty reservist as a non-public employee in 5 U.S.C. §2105(d) and the Navy's traditional and consistent treatment of off-duty reservists probably outweighs the military's desire to restrict free speech in this case.

It is necessary and important for this Honorable Court to determine what doctrine should be used to analyze the restriction on First Amendment rights of off-duty reservist personnel, particularly in light of the growing importance of reservists in our national scheme of defense readiness.

III.

CONCLUSION

Goldman v. Weinberger, supra, does not apply to Petitioner Banks under the facts of this case because he was not in any duty status at the time he wrote to Congressmen. An off-

duty reservist is not a public employee under 5 U.S.C. §2105(d) and is therefore a civilian who may write to Congressmen without military censorship. To apply Goldman v. Weinberger, supra, to off-duty reservists extends that decision to many millions of reservists and retired military personnel while they are not serving in the military. This Honorable Court's review of such a broad, far-reaching extension of the Doctrine of Military Necessity to restrict First Amendment rights is absolutely critical and of paramount importance. The basic concept and traditional foundation of the military reserve system is at stake.

Respectfully Submitted,

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(3)

No. 89-1966

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1989

RICHARD A BANKS,
Petitioner, Plaintiff

vs.

H. LAWRENCE GARRETT, III,
Secretary of the Navy,
Respondent, Defendant.

AMICUS CURIAE BRIEF IN SUPPORT OF THE GRANTING OF PETITIONER-PLAINTIFF'S PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE BRIEF

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QUESTION PRESENTED FOR REVIEW OF INTEREST TO AMICUS CURIAE

Without distracting from Petitioner's Questions Presented For Review, the Government Accountability Project believes that the facts of this case focus with unusual clarity the incongruity of the Military Necessity Doctrine, which the majority of the Supreme Court applied in the Goldman v. Weinberger, 475 U.S. 503 (1986), with First Amendment and statutory rights of members of the Armed Forces to communicate directly with members of Congress. Here the Goldman Military Necessity Doctrine was relied on by the District Court and Court of Appeals to defer to the judgment of the military, specifically to sustain the interest of the Department of the Navy to speak with the single voice to Congress. But, this interest is not peculiarly military. Goldman leaves unanswered: Where,

if anywhere, this Court will stop being more deferential in its review of military regulations challenged on First Amendment grounds than it is for Constitutional review of similar laws or regulations designed for civilian society? To the Government Accountability Project this question cries out for answer, it is directly raised by the instant case, and the Military Necessity Doctrine is overdue for reassessment.

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INTEREST OF AMICUS CURIAE

The Government Accountability Project is a non-profit, non-partisan, public interest organization founded in 1977 to support public employees and corporate workers who seek to prevent waste, corruption, and threats to public health and safety.

The Petitioner, Richard A. Banks, was subjected to what we recognize as typical of actions taken against Government Whistleblowers. These retributions against Whistleblowers are almost certain to escape close scrutiny if carried out by the military officials because they are shielded by the Military Necessity Doctrine, a doctrine that insulates the military from effective judicial review for violating the Constitutional rights of members of the Armed Forces.

Make no mistake about it, the Military Necessity Doctrine has already substantially

chilled First Amendment expression and inclinations to inform Congress of waste, abuse and fraud by members of the Armed Forces. It sends a legitimatizing message to those military officials prone to suppress individuality of service personnel even to the point that in documented cases members of the Armed Forces have been incarcerated in mental institutions without reason other than their exposures of waste, fraud and abuse in the Armed Forces.

The question of when, if ever, the judiciary is prepared to defend the liberties of Americans who serve their country in the Armed Forces deserves an answer.

The Military Necessity Doctrine leads to inefficient micromanagement at the Congressional level. Even then, such micromanagement is often foiled by the Military Necessity Doctrine, which requires lower courts to interpret military

regulations broadly while at the same time requiring them to construe conflicting statutes in a restrictive manner -- all quite different than how statutes and regulations that govern other public agencies are interpreted.

As exemplified by this case, the doctrine is even used to inhibit communications to members of Congress which, per se, impedes Congress in performing its function to regulate the Military.

In the instant case, the decisions of the lower courts were unquestionably premised on the Military Necessity Doctrine as expounded by the majority in Goldman. This doctrine, in our judgment, conflicts with the public interest. Because of our institutional interest to protect that public interest, we urge this Honorable Court to grant the Petition for Writ for Certiorari.

STATEMENT OF THE CASE

Commander Banks, as a Reserve Officer, was in command of a Naval Reserve Air Squadron scheduled to receive new F/A-18 Aircraft. Considerable time, effort, money were expended and permanent changes of station for personnel occurred incident thereto. However, when the transition was almost complete Commander Banks heard rumors that his Squadron would not receive the new aircraft. Upon checking, he learned that considerable political pressure was being brought to bear by active duty Navy pilots, via a Congressional staffer, on the Secretary of Navy to abort the planned transfer of new aircraft to Commander Banks' Squadron.

To learn what he could do, Commander Banks consulted with his own superiors, with a retired Rear Admiral who had been Chief of Naval Reserve and who recommended writing letters to members of Congress, and with the

Naval Reserve Association. The latter informed him that he could write members of Congress about the matter and in doing so could use his rank and position. He obtained a copy of 10 U.S.C. 1034, which provided no person may restrict any member of an Armed Force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessity to security of the United States.
Contrary to the facts in Goldman, he had no intention of violating any law or regulation.

Commander Banks, in fact, did not see or sign letters prepared for him to members of Congress. Nevertheless, he has taken full responsibility for the use of official Squadron letterhead, with his name signed by others as Commanding Officer, in about twelve to fifteen identical letters sent to members of Congress.

A well known tactic for dealing

Whistleblowers is to remove them from their jobs as soon as possible on almost any pretext. Here, it was decided that Commander Banks had violated Navy Regulations, Article 1149, Communications to the Congress, by using official letterhead in his letters to Congress. This is so although there was an extensive investigation by the Navy Intelligence Service concerning Commander Banks' letters to members of Congress. The superior officer who removed Commander Banks from his position as Squadron Commanding Officer stated in writing his action "was based solely on his [Commander Banks'] disregard for Navy Regulation Article 1149." The same officer also stated that until such time, "he performed his duties as Commanding Officer in an outstanding manner."

Thus to justify Banks' removal as Squadron Commanding Officer, the lower courts had to construe Article 1149 broader than its

language otherwise warranted particularly in view of the immediately prior Article 1148, which is a repetition of 10 U.S.C. 1034. There is nothing in such Article 1148 (or 10 U.S.C. 1034 from which it was copied) to suggest that a member of the Armed Forces who communicates with a member of Congress on official letterhead stationery thereby forfeits the protection of that Article and the identical Statute.

In other words, the lower courts, in applying the Military Necessity Doctrine of Goldman v. Weinberger, 475 U.S. 503 (1986) construed a regulation broadly and a conflicting statute narrowly. They also simply ignored 5 U.S.C. 2105(d) which provides that a reserve of the Armed Forces not on active duty, which was Banks' status, is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in

connection with the United States because of his appointment, oath or status, or any duties or functions performed or pay or allowances received in that capacity.

SUMMARY OF THE ARGUMENT

The purpose of this Amicus Curiae Brief is to persuade the Court to grant the Petition for Writ Certiorari. If such Writ is granted, it is the intention of the Government Accountability Project to file a further, more comprehensive Brief. We consider it particularly essential that the Congressional mandate of the Military Whistleblower Protection Act (Public Law 100-456, 102 Stat. 2024, 10 U.S.C.A. 1034 (1990)) to protect free flow of information from military service members to Congress be implemented without the threat of dilution premised on the Military Necessity Doctrine.

In the following argument, we also

outline briefly the basis for the Military Necessity Doctrine, practical problems it is causing by suppressing the First Amendment rights of those in military who might otherwise report waste, fraud and abuse, and that the doctrine as expressed in Goldman has been widely criticized.

ARGUMENT

Most judicial holdings relating to the Constitutional rights of service personnel focus on the First Amendment issues.

For non-military cases, this Court has substantially foreclosed Government disciplining of federal employees for the exercise of First Amendment rights. Unless the harm to Government interest is sufficiently serious to override values protected by the First Amendment, the Government cannot take adverse actions against those who exercise their First

Amendment Rights. Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of Education, 391 U.S. 563 (1968).

In contrast, for the military, with Orloff v. Willoughby, 345 U.S. 83 (1953), being an often cited leading case, this Court has consistently held that the military can restrict Constitutional rights of its members. The Court's reasoning is that the military constitutes a specialized community which may be governed by a different set of rules than for civilians. It was therefore considered necessary that the judiciary scrupulously avoid intervening in legitimate military matters, whereas the military should be scrupulous to avoid intervening in legitimate judicial matters. The principles of Orloff were reiterated in Parker v. Levy, 417 U.S. 733 (1974). In Parker, it was held that the necessity for maintaining obedience and discipline is fundamental to the

functioning of the Armed Forces and Army Regulations restricting free speech were not facially invalid for constraining First Amendment rights.

Aside for the requirement to ensure the military is always capable of performing its mission promptly and reliably, and therefore must insist upon a respect for duty and discipline without counterpart in civilian life, a second basis for the Military Necessity Doctrine is judicial deference to Congress. Congress has the power To make Rules for the Government and Regulation of the land and naval Forces pursuant to Article I, Section 8, Clause 14. Because of this Constitutional provision, judicial deference was held "at its apogee when legislative action under the Congressional authority to raise and support Armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S.

57, 70 (1981).

This Court in Brown v. Glines, 444 U.S. 348 (1980) and Secretary of the Navy v. Huff, 444 U.S. 453, (1980) upheld regulations requiring service members to obtain approval from base commanders before circulating petitions on or around the base. In both cases, plaintiffs claimed the regulations were in violation of 10 U.S.C. 1034 which prohibits the Armed Forces from preventing servicemen from communicating with members of Congress. In Huff, this Court said that such statutes must be construed to avoid limiting a base commander's authority any more than the legislative purpose requires.

The standard of review for military decisionmaking that results from the above cases is essentially that the military can circumvent rights and freedoms granted by the First Amendment by an assertion of "Military Necessity". No link between the restricted

right and the claimed military need is required. The Armed Service involved need not show how exercise of the right in question threatens any aspect of military order. ARIZONA LAW REVIEW, Vol. 30, p 354.

The situation is "Catch-22". This Court has, in effect, said to the military that if you leave us alone we will leave you alone, and to Congress that governing the military is your responsibility, but we will construe any laws which Congress passes to regulate the military as narrowly as their purposes allow to avoid conflicts with any regulations prescribed by the military.

As this case demonstrates, even regulations that inhibit communications to members of Congress will be given judicial deference, thus handicapping Congress to carry out the very function used as a basis for the Military Necessity Doctrine.

In April of 1986, Mr. Robert M. O'Neil,

president of the University of Virginia, delivered The Tenth Charles L. Decker Lecture in Administrative and Civil Law at the Army Judge Advocate General's School. His lecture is reported in the MILITARY LAW REVIEW, Volume 113, Summer of 1986, commencing on page 31. Mr. O'Neil expressed particular sympathy with Justice O'Connor's view. Her view was also considered in the ARIZONA LAW REVIEW, Vol. 30, at 358, as arguably the most workable standard. It would require the Government to satisfy a two prong test before restricting Constitutional rights of military personnel: First an extremely important military interest must be at stake; Second, the Government must show the asserted military interest will be significantly harmed by granting the requested exemption.

Mr. O'Neil thought the matter would soon be rendered moot by legislation. But, two years later in the MILITARY LAW REVIEW, Vol.

121, Summer 1988, First Lieutenant Dwight H. Sullivan's Article, p. 125, The Congressional Response to Goldman v. Weinberger, informs us that although Goldman was subject to considerable criticism, the greatest objection being its extreme deference to the military, corrective legislation did not occur despite attempts until in the 1988 Defense Authorization Bill. That legislation, once enacted, established a modest, reasonable, and functional boundary between military necessity and an important First Amendment right of military service members. The decisions below potentially threaten that statutory boundary.

The experience of the Government Accountability Project has been that many significant problems within the military are raised by Whistleblowers. Almost all Whistleblowers are harassed to a greater or lesser extent. Some are placed in the locked

wards of Military hospitals as mental cases for no other reason. This is specifically documented in Whistleblower Protection in the Military, Hearing Before the Acquisition Policy Panel of the Armed Services of the Committee on Armed Services, House of Representatives, H.A.S.C. No. 100-42, November 1987, and generally in the earlier Committee Print, The Whistleblowers, a Report on Federal Employees who Disclose Acts of Government Waste, Abuse and Corruption, prepared for the Committee on Government Affairs, the United States Senate, February 19, 1978.

The Military Necessity Doctrine, as a practical matter, condones a consistent pattern of reprisals against those in the Armed Forces who disclose waste, abuse and corruption. The treatment accorded to dedicated Americans, such as Banks, who have the courage to speak up sends a very real

message that effectively restrains many more who are otherwise motivated to do so. As a result the public and Congress hear mostly only what the military want them to hear. Whether or not this information is true, a free flow of information of the type protected by the First Amendment from military personnel to members of Congress is almost non-existent. The Military Necessity Doctrine may not be the cause of the problem for it also arises in other government bureaucracies. But there is amply reason to conclude that the doctrine is seriously flawed, that it contributes to the problem and the Banks petition provides an unparalleled opportunity for this Court to revise the doctrine along more sensible lines or to abandon it altogether.

CONCLUSION

The Banks' case involves First Amendment

rights expressed in communications directed to members of Congress. The lower courts, in denying any remedy to Banks, relied heavily on this Court's criteria as expounded in Goldman, and thus construed Article 1149, Navy Regulations broadly, even extensively, while construing the conflicting 10 U.S.C. 1034 narrowly and ignoring 5 U.S.C. 2105(d). The Banks' case provides an excellent vehicle for a critical review of the Military Necessity Doctrine as expressed in Goldman.

We therefore respectfully urge that the Banks' Petition for Writ for Certiorari be granted.

Respectfully submitted,

GOVERNMENT ACCOUNTABILITY PROJECT

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